



is proud to announce

*The Third Shamnad Basheer Essay Competition on
Intellectual Property Law (2022)*

Entries adjudged by:

Prof. Shubha Ghosh, Crandall Melvin Professor of Law and Director of the Technology Commercialization Law Program and the Syracuse Intellectual Property Law Institute at Syracuse University College of Law in Syracuse, New York, United States.

Prof Srividhya Ragavan, Professor of Law at the Texas A&M School of Law and the Faculty Director of the School's International Legal Studies Program.

III Prize

Tanishka Goswami

National Law University, Delhi

tanishka.goswami18@nludelhi.ac.in

For the essay

***The Copyright Paradox: Striking The Balance Between Free
Speech & Copyright In India***

THE COPYRIGHT PARADOX: STRIKING THE BALANCE BETWEEN FREE SPEECH & COPYRIGHT IN INDIA

Tanishka Goswami

1. Introduction.....	1
2. Understanding the Conflict between Copyright and Free Speech.....	2
a. Insufficiency of the Idea-Expression Dichotomy.....	3
b. Uncertainty in the Application of the Fair Use & Fair Dealing Doctrines.....	5
c. The Ensuing ‘Chilling Effect’ on Free Speech.....	6
3. The Indian Experience: How Courts have Approached Free Speech & Fair Dealing.....	8
a. The Judiciary’s Approach towards Free Speech in Copyright Cases.....	9
(a) Educational Use & Access.....	9
(b) Dissemination of Sports Information.....	11
b. How this Impacts the Public’s Right of Access to Information.....	12
4. Conclusion: Reconciling the Inevitable Free Speech Conflict.....	13

1. Introduction

As a proprietary concept, copyright empowers individuals to preserve their creation by excluding others’ freedom to communicate with it.¹ Certain normative issues arise when reproduction of copyrighted works is essential for enjoying the freedom of expression, but the allowances under copyright law (through the ‘fair dealing’ doctrine and the idea-expression dichotomy) are insufficient for safeguarding such freedom.²

¹ Amanda Beshears Cook, ‘Copyright and Freedom of Expression: Saving Free Speech from Advancing Legislation’ (2013) 12 Chicago-Kent Journal of Intellectual Property 1.

² Rebecca Tushnet, ‘Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It’ (2004) 114 Yale Law Journal 535, 538.

Prof. Nimmer asked in the 1970s, “Is it not precisely a “law” [the Copyright Act] made by Congress which abridges the “freedom of speech” and “of the press” in that it punishes expressions by speech and press when such expressions consist of the unauthorized use of material protected by copyright?” Thereafter, several scholars³ have remarked how legal uncertainty around the distinction between expressions and ideas, and judicial application of the fair use doctrine carry a ‘chilling effect’ on free speech.

In India, section 52 of the Copyright Act, 1957 (“the Act”) includes ‘fair dealing’ as an exception to copyright infringement. Whilst the Act does not describe the term, subsection (1)(a) mentions that “fair dealing with any work, not being a computer programme” for personal uses like research, review or criticism, and reporting current events does not constitute infringement. Apart from free speech, a rich and substantive conception of democracy⁴ entails the right to access information under Article 19(1)(a) of the Indian Constitution.

In this light, the essay addresses the conflict between public benefit purposes of copyright protection and the danger caused by private monopolies over information. The author undertakes a legal and jurisprudential analysis of the ‘fair dealing’ doctrine to ascertain whether the goal of copyright laws to promote wide dissemination of ideas is furthered/restricted through its application. To that end, the author specifically focuses on Indian case-law exploring the interface between Article 19(1)(a) and ‘fair dealing’.

2. Understanding the Conflict between Copyright and Free Speech

³ Lee Lockridge, ‘The Myth of Copyright’s Fair Use Doctrine as a Protector of Free Speech’ (2007) 24 Santa Clara High Technology Law Journal 31; Edmund T. Wang, ‘The Line Between Copyright and the First Amendment and Why its Vagueness may Further Free Speech Interests’ (2011) 13 Journal of Constitutional Law 1471.

⁴ Gautam Bhatia, ‘Copyright and Free Speech – II: Constitutional arguments against OUP et al in the DU Photocopying Case’ (*Indian Constitutional Law and Philosophy*, 7 October 2013) <<https://indconlawphil.wordpress.com/2013/10/07/copyright-and-free-speech-ii-constitutional-arguments-against-oup-et-al-in-the-du-photocopying-case/>> accessed 6 June 2022.

Both copyright and free expression act as a common designation of respect for human creativity.⁵ Though considered as ‘built-in free speech safeguards’,⁶ the idea-expression dichotomy and the ‘fair use’ exception are vague in several ways,⁷ thereby risking chilling effects on freedom of expression. In this light, *firstly*, this section examines issues surrounding the idea-expression dichotomy and the ‘fair use’ exception in the U.S. *Secondly*, it assesses the insufficiency of the ‘fair dealing’ doctrine in India in adequately protecting free speech.

a. Insufficiency of the Idea-Expression Dichotomy

17 U.S.C. § 102(b) codifies the idea-expression dichotomy to ensure that monopoly through grant of copyright lasts only in the specific implementation of an approach, and not in the total method for realizing a specific intended result.⁸ In this way, copyright law maintains the ideas behind copyrighted works as building blocks available to new creators.⁹

Prof. Nimmer envisaged that ideas belong to the “free speech side”, while their specific selection, articulation, and arrangement belong to the “copyright side”.¹⁰ Subsequently, courts resorted to this proposition to achieve equilibrium between copyright protection and free speech interests under the First Amendment.¹¹ However, the lack of concrete distinction between ideas and expressions¹² has resulted in U.S. courts failing to undertake a free speech scrutiny in copyright cases.¹³

⁵ Jan Rosén, ‘Copyright and freedom of expression in Sweden – Private Law in a Constitutional Context’ in Paul Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar 2007) 355.

⁶ *Eldred v Ashcroft* 537 U.S. 186; *Golan v Holder* 132 S. Ct. 873.

⁷ Joseph P. Liu, ‘Copyright and Breathing Space’ (2007) 30 *Columbia Journal of Law & the Arts* 101.

⁸ Committee on the Judiciary, *Copyright Law Revision* (USHR 1976, 94-1476) 61 <<https://law.resource.org/pub/us/works/aba/ibr/H.Rep.94-1476.pdf>> accessed 16 June 2022.

⁹ Lockridge (n 4) 37.

¹⁰ Melville B. Nimmer ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’ (1970) 17 *UCLA Law Review* 1180.

¹¹ Christophe Geiger, ‘Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?’ (2018) 8 *IP and Human Rights* 426; *Harper & Row Publishers, Inc. v Nation Enterprises* 471 U.S. 539 (1985).

¹² Wang (n 4) 1478.

¹³ Raymond Shih Ray Ku, ‘F(r)ee Expression – Reconciling Copyright and the First Amendment’ (2016) 57 *Case Western Reserve Law Review* 872-873; *see, Harper & Row Publishers, Inc.* (n 16).

As early as 1879, the SCOTUS implied a two-step analysis¹⁴ to give effect to the idea-expression dichotomy in *Baker v. Selden*.¹⁵ The *first* step entails identifying the idea underlying a work, and the *second* step involves determining whether/not enforcing the copyright claim would monopolize the idea itself. The latter frequently requires courts to examine diverse ways in which the idea concerned can be expressed.¹⁶ While this approach appeared attractive, it provided *no predictability*.¹⁷

It was difficult for courts to identify specific points at which an idea concretely converted into expression.¹⁸ Subsequently, Judge Learned Hand proposed the “abstractions test” to address this.¹⁹ Though cited in several judgments subsequently,²⁰ this approach did little to reduce the inherent vagueness. In fact, Judge Learned Hand himself acknowledged that this approach relied primarily on instinct.

In India, the Supreme Court’s judgment in *RG Anand v. Deluxe Films*²¹ provides guidance in this regard: it recognized that copyright cannot lie in an “idea, subject-matter, themes, plots”.²² Instead, such copyright lies in the “form, manner, arrangement and expression of the idea by the author...”.²³ However, the Supreme Court did not concern itself with fleshing out differences between the two paradigms. This left authors and creators with vague ideas regarding the precise ambit of protection from non-literal copying.²⁴ Hence, while the idea-expression dichotomy certainly narrows the conflict between free speech considerations and copyright,²⁵ it suffers from the abovementioned flaws and is difficult to apply.

¹⁴ Alfred C. Yen, ‘A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work’s Total Concept and Feel’ (1989) 38 Emory Law Journal 401.

¹⁵ 101 U.S. 99 (1879).

¹⁶ *Landsberg v Scrabble Crossword Game Players, Inc.* 736 F.2d 485.

¹⁷ Tushnet (n 3) 535.

¹⁸ Matthew D. Bunker, ‘Adventures in the Copyright Zone: The Puzzling Absence of Independent First Amendment Defenses in Contemporary Copyright Disputes’ (2009) 14 Communication Law & Policy 273.

¹⁹ *Nichols v Universal Pictures Corp.* 45 F.2d 119.

²⁰ *Sid & Marty Krofft TV Prods. v McDonald’s Corp.* 562 F.2d 1157.

²¹ AIR 1978 SC 1613.

²² *ibid* [18], [46].

²³ *ibid*.

²⁴ TG Agitha, ‘Idea-Expression Dichotomy and Originality Requirements: An Analysis of the Jurisprudential Underpinnings of the Judicial Pronouncements in India’ in Manoj Kumar Singh and Vandana Mahalwar (eds), *Copyright Law in the Digital World: Challenges and Opportunities* (Springer 2017) 6.

²⁵ Michael D. Birnhack, ‘Chapter 19E – Freedom of Speech’ in Melville B. Nimmer and David Nimmer (eds), *Nimmer on Copyright – Vol. 4 Chapters 13-20* 19E.04[B][1].

b. Uncertainty in the Application of the Fair Use & Fair Dealing Doctrines

The ‘fair use’ doctrine is codified in 17 U.S.C. § 107 that enunciates four different parameters for deciding fair use –

- “(1) *the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (2) the nature of the copyrighted work;*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;*
- (4) the effect on the potential market for or value of the copyrighted work.”*

With reference to the first factor, the SCOTUS adopted the ‘transformative use’ test²⁶ entailing examination of novel additions to the original work. Inevitably, these parameters are evaluated through case-by-case analysis.²⁷ While undertaking such analysis, courts have to be mindful of the general objective of copyright laws in “promoting the progress of science and useful arts”.²⁸ However, the process of determining the degree of transformativeness has rendered the legality of copying increasingly ambiguous.²⁹

Modern technology has generated new industries and methods for reproducing and disseminating copyrighted works. These changes have enlarged the scope of copyright owners’ rights,³⁰ further indicated by courts’ failure to recognize copyright as a tool designed for public benefit. For instance, the determination of ‘transformative use’ by SCOTUS in *Google LLC v. Oracle America, Inc.* (2021) drew ire from critics.³¹ Justice Breyer found Google’s use of Oracle’s declaring code as transformative ‘reimplementation’, thereby infusing further haziness about *how broadly* the doctrine

²⁶ *Campbell v Acuff-Rose Music, Inc.* 510 U.S. 569 (1994); *Google LLC v Oracle America, Inc.* 593 U.S. ____ (2021).

²⁷ *Castle Rock Entertainment, Inc. v Carol Publishing Group, Inc.* 150 F.3d 132.

²⁸ *Blanch v Koons* 467 F.3d 244.

²⁹ Amy Adler, ‘Fair Use and the Future of Art’ (2016) 91 *New York University Law Review* 562-563.

³⁰ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin Books 2005) 143-144.

³¹ Kevin Madigan, ‘The One Saving Grace of Google v. Oracle Might be Its Limited Applicability’ (*Copyright Alliance*, 13 April 2021) <<https://copyrightalliance.org/google-oracle-one-saving-grace/>> accessed 16 June 2022.

of fair use has to be construed.³² The Court also left open the question of the weight that is to be accorded to different fair use factors.³³

In India, section 52(1)(a) of the Act provides that fair dealing with any work (which is not a computer programme) would not infringe copyright, for – (i) personal/private use, including research; (ii) criticism or review, either of that or any other work; and (iii) reporting current events and affairs, including lectures delivered in public. While the law is in its formative stage, courts may *restrict* the application of section 52(1)(a) to the exhaustive set of grounds mentioned thereunder.³⁴

For instance, the ‘fair dealing’ standard expounded by the Madras HC requires fulfillment of two conditions: *one*, the alleged infringer does not intend to compete with the holder of a copyright in the same market; and *two*, there is no improper motive in dealing with the said work.³⁵ *Prima facie*, improper motive cannot be ascribed to parody works³⁶ “in the context of contemporary politics and other topical issues”.³⁷ However, the application of the “transformative use” test,³⁸ once hailed as a “significant victory for would-be parodists”,³⁹ eventually brought about inconsistent results in the U.S.⁴⁰ It is not difficult to envisage a similar fate in India, since all ‘parody works’ have not been explicitly recognised as a ‘fair dealing’ ground under section 52.

c. The Ensuing ‘Chilling Effect’ on Free Speech

In *New York Times v. Sullivan*,⁴¹ the landmark case on libel laws and freedom of the press in the U.S., the SCOTUS discussed how ambiguity in libel laws on citizens’ First

³² *Google LLC* (n 27) [82]-[83].

³³ Adam Mossoff, ‘Google v. Oracle: A Copyrightability Decision Masquerading as Fair Use’ (*Hudson Institute*, 7 May 2021) <<https://www.hudson.org/research/16900-google-v-oracle-a-copyrightability-decision-masquerading-as-fair-use>> accessed 17 June 2022.

³⁴ Prof. Dr. N. Gopalakrishnan and Others, ‘Like-Minded IP Teachers’ Working Group on Intellectual Property and Public Interest [Copyright Amendment 2020-21]’ <www.bit.ly/COPYRIGHT2020> accessed 17 June 2022.

³⁵ *M/s. Blackwood & Sons Ltd. v A.N. Parasuraman* AIR 1959 Mad. 410.

³⁶ *Civic Chandran v Ammini Amma* 1996 SCC OnLine Ker 63.

³⁷ ‘Satire’ (*Oxford Reference*) <<https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100442626>> accessed 17 June 2022.

³⁸ *Campbell* (n 27) 581.

³⁹ J.M. Fox, ‘The Fair Use Commercial Parody Defense and How to Improve It’ (2006) 46 IDEA 619, 628.

⁴⁰ Rahul Saha and Sryon Mukherjee, ‘Not So Funny Now Is It? The Serious Issue of Parody in Intellectual Property Law’ (2008) 1 Indian Journal of Intellectual Property Law 49.

⁴¹ 376 U.S. 254 (1964).

Amendment rights.⁴² Hence, mistakenly restricting free expression of protected speech was deemed worse than erroneously allowing defamatory speech. Allowing for a 'breathing space' enables active public discussions that are not chilled by any potential liability.⁴³ Despite copyright law's inherent characteristics of influencing free expression, a similar 'breathing space' has not been carved out in this domain.

This is despite several international instruments acknowledging how freedom of artistic creativity is integral to free expression. Article 10 of the European Convention on Human Rights, Article 15 of the International Covenant on Economic, Social and Cultural Rights, and Article 19 of the International Covenant on Civil and Political Rights protect artistic expression and creativity within free expression.⁴⁴ Additionally, a Report of the UN Special Rapporteur on cultural rights significantly discussed how free artistic expression is linked to the 'freedom to seek' ideas.⁴⁵

The Indian news commentary space demonstrates the chilling effect emerging from the absence of 'breathing space'. TV-Today Network, an English-Hindi news network filed a suit for ₹2 crores against Newslaundry, a news media company that frequently critiques mainstream reportage through creative media on its YouTube channel.⁴⁶ After 53 claims of copyright infringement, Newslaundry's channel was 'temporarily frozen' by YouTube,⁴⁷ thereby preventing its journalists from sharing reports through different programmes. Later, it agreed to take down its video commentary on the copyright suits filed by TV-Today.⁴⁸

I briefly interviewed Mr. Abhinandan Sekhri, the CEO and co-founder of Newslaundry in this regard. He revealed that being slapped with copyright infringement forced the organization to 'waste' its time in dealing with complicated legal suits, over reporting

⁴² Mary-Rose Papandrea, 'Where Intellectual Property and Free Speech Collide' (2009) 50 Boston College Law Review 1307.

⁴³ Liu (n 8) 109.

⁴⁴ European Court of Human Rights, *Guide on Article 10 of the European Convention of Human Rights* (2021) 12 <https://www.echr.coe.int/documents/guide_art_10_eng.pdf> accessed 15 April 2022; *Müller & Ors. v Switzerland* (Application No. 10737/84) <<https://hudoc.echr.coe.int/eng?i=001-57487>> accessed 17 June 2022.

⁴⁵ UNHRC 'Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: The right to freedom of artistic expression and creativity' (2013) UN Doc A/HRC/23/34, 4.

⁴⁶ Scroll Staff, 'India Today Group files Rs 2 crore suit against 'Newslaundry' for defamation, copyright infringement' (*Scroll.in*, 26 October 2021) <<https://scroll.in/latest/1008626/india-today-group-files-rs-2-crore-suit-against-newslaundry-for-defamation-copyright-infringement>> accessed 18 June 2022.

⁴⁷ The Wire Staff, 'Newslaundry's YouTube Channel Taken Down After India Today Reports 'Copyright Violation' (*The Wire*, 9 October 2021) <<https://thewire.in/media/newslaundrys-youtube-channel-taken-down-after-india-today-reports-copyright-violation>> accessed 18 June 2022.

⁴⁸ Akshita Saxena, 'Newslaundry Agrees Before Delhi High Court To Take Down Video Making Comments On TV Today's Suit Against It' (*Live Law*, 16 November 2021) <<https://www.livelaw.in/news-updates/newslaundry-tdelhi-high-court-india-today-tvtoday-defamation-copyright-suit-185672>> accessed 18 June 2022.

real stories. He argued that while being an established media organization helped them tide over such suits, small media organizations may get crushed owing to the costs of such protracted litigation. When asked about reporters' expectations from copyright enforcement mechanisms, Mr. Sekhri emphasized upon a systematic approach towards fair dealing. He remarked, "It should be on a case-to-case basis...We don't need to re-invent the legal doctrine. We simply need courts to devise clear standards while assessing fair dealing in a systematic fashion."⁴⁹

While the fair dealing defence is likely to succeed here owing to how the impugned works constitute criticism/review,⁵⁰ easy abuse of copyright laws facilitates stifling of free speech.⁵¹ This becomes a concern since authors/creators often *rely on previous works* to express their ideas effectively.⁵²

So far, the SCOTUS has not modified substantive legal doctrines, or prescribed restrictions on copyright's theoretical limits while examining the above-discussed chilling effect. In India, courts fail to provide satisfactory reasons for disregarding significant constitutional values. The next section of the paper assesses relevant Indian jurisprudence.

3. The Indian Experience: How Courts have Approached Free Speech & Fair Dealing

In *Wiley Eastern Ltd. v. Indian Institute of Management*,⁵³ the Delhi HC noted the fundamental object of section 52 of the Act in protecting the right enshrined in Article 19(1)(a) of the Constitution.⁵⁴ Rather than negatively defining 'infringement', section 52(1)(a) intends to protect fair dealing through research, criticism, reviews and reporting of current developments. Indian courts have repeatedly opined that no 'hard

⁴⁹ Telephonic Interview with Abhinandan Sekhri, (Delhi, India, 13 April 2022).

⁵⁰ Nikhil Purohit, 'Aaj Tak v. Newslaundry: Assessing the Fair Dealing Question' (*SpicyIP*, 18 November 2021) <<https://spicyip.com/2021/11/aaj-tak-v-newslaundry-assessing-the-fair-dealing-question.html>> accessed 9 April 2022.

⁵¹ Gautam Bhatia, 'The Chilling Effect in India' (*Indian Constitutional Law and Philosophy*, 5 December 2013) <<https://indconlawphil.wordpress.com/2013/12/05/the-chilling-effect-in-india>> accessed 18 June 2022.

⁵² Neil Weinstock Netanel, *Copyright's Paradox* (OUP 2008) 37.

⁵³ 1995 SCC OnLine Del 784.

⁵⁴ *ibid* [19].

and fast rules' can be set to determine fair dealing of copyrighted works.⁵⁵ Rather, 'fair dealing' has been envisaged as a tool balancing the interests of creators and authors to enable free flow of information and ideas.⁵⁶

a. The Judiciary's Approach towards Free Speech in Copyright Cases

This section assesses Indian courts' approach towards Article 19(1)(a) arguments in cases concerning access to academic works, and dissemination or reporting of information on sports. As a word of caution, the focus of this section is *solely* on the interaction of fair dealing and free speech, and does not extend to multiple other arguments raised in the discussed cases.

(a) Educational Use & Access

In *The Chancellor, Masters & Scholars of University of Oxford v. Rameshwari Photocopy Services*,⁵⁷ a Division Bench of the Delhi HC held that preparing and distributing 'course packs' based on relevant portions of prescribed syllabus books did not amount to copyright infringement. The same was considered protected by section 52(1)(i) of the Act that provides for the 'educational use' exception.⁵⁸

The matter was first adjudicated by a single-judge Bench. While this judgment was seen as a watershed in the 'access to knowledge' movement, Justice Endlaw's approach towards the fair dealing provision, i.e. section 52(1)(a), was unclear.⁵⁹ *Firstly*, the use of the terms 'fair use' and 'fair dealing' interchangeably results in confusion concerning their respective ambit.⁶⁰

⁵⁵ *Super Cassettes Industries Ltd. v Hamar Television Network Pvt. Ltd.* 2010 SCC OnLine Del 2086, 8(i).

⁵⁶ *ibid* [7.15].

⁵⁷ 2016 SCC OnLine Del 5128.

⁵⁸ Dr. Arul George Scaria, 'Delhi University Photocopy Shop Judgment: A Landmark in the Access to Knowledge Movement in India' (*Live Law*, 24 September 2016) <<https://www.livelaw.in/delhi-university-photocopy-shop-judgement-landmark-access-knowledge-movement-india/>> accessed 21 June 2022.

⁵⁹ Eashan Ghosh, 'Fundamental Errors in Fundamental Places: A Case for Setting Aside the Delhi University Photocopying Judgment' (2016) 9 NUJS Law Review 1, 13.

⁶⁰ Mathews P. George, 'A Critique of DU Photocopy Judgment-II' (*SpicyIP*, 14 October 2016) <<https://spicyip.com/2016/10/a-critique-of-du-photocopy-judgment-ii.html>> accessed 24 June 2022.

Secondly, the back-and-forth regarding the applicability of section 52(1)(a) further complicated matters. While Justice Endlaw initially precluded the provision's applicability on grounds that specific clauses (h), (i) and (j) dealt with factual situations similar to the case, he later returned to section 52(1)(a) in paragraph 78. Here, he noted that printing images of books (taken via cellphones) constitutes 'fair use'. While this interpretation is a win for students, it is selective and casts clouds on the extent to which fair dealing can be liberally interpreted.⁶¹

Upon appeal,⁶² the Division Bench recognized that Justice Endlaw's reference to section 52(1)(a) merely sought to strengthen his interpretation of section 52(1)(i) w.r.t. the facts of the case. It clearly noted that section 52(1)(a) had no relevance to the case. It recognized that: *one*, fairness would be determined against the standard of "extent justified by the purpose"; *two*, the extent of material used, both qualitatively and quantitatively, would not matter.⁶³ Despite this improvement from the single judge's approach towards fair dealing, the Court missed the opportunity to appreciate the *clear link* between constitutional values and fair dealing.

Needless to say, access to study material is a significant part of the modern educational experience. In fact, several scholars, including Prof. Shamnad Basheer have argued for the right of students to copy.⁶⁴ This need has been amplified by the shift to online education owing to the Covid-19 pandemic.⁶⁵ Despite this, applying the 'fair dealing' doctrine in relevant contexts continues to remain unpredictable. Ongoing litigation in the Delhi HC against shadow libraries Sci-Hub and Libgen that make available millions of academic works online has also highlighted the conflict between the

⁶¹ Prashant Reddy, 'Counterinterview: The Outcome of the DU Photocopy Case Isn't Necessarily Good News for Higher Academia in India' (*SpicyIP*, 19 September 2016) <<https://spicyip.com/2016/09/counterinterview-the-outcome-of-the-du-photocopy-shop-isnt-necessarily-good-news-for-higher-academia-in-india.html>> accessed 21 July 2022.

⁶² 2016 SCC OnLine Del 6229.

⁶³ *ibid* [33].

⁶⁴ Shamnad Basheer, 'Why students need the right to copy' (*The Hindu*, 26 April 2013) <<https://www.thehindu.com/opinion/op-ed/why-students-need-the-right-to-copy/article4654452.ece>> accessed 24 June 2022.

⁶⁵ Basu Chandola, 'Copyright in Educational Material: Lessons from COVID-19' (*Observer Research Foundation*, 19 January 2022) <<https://www.orfonline.org/expert-speak/copyright-in-educational-material/>> accessed 24 June 2022.

constitutional right to receive information and copyright law.⁶⁶ Courts need to clarify how the phrase ‘for the purpose of’ in section 52(1) would be interpreted.⁶⁷

(b) Dissemination of Sports Information

Sports broadcasting in India has grown from just one State-run broadcaster, to numerous satellite-enabled channels and internet-based streaming services.⁶⁸ Users can even track ball-by-ball events through mobile applications. Inevitably, this has given rise to multiple issues in copyright law, particularly concerning fair dealing.

In *New Delhi Television Ltd. v. ICC Development (International) Ltd.*,⁶⁹ a division bench of the Delhi HC allowed use of match footages for ‘expert analysis’ programmes as fair dealing. The court affirmed the earlier position taken in *ESPN Star Sports v. Global Broadcast News*⁷⁰ that fair dealing can be determined only on a case-to-case basis.⁷¹ In *ESPN*, the reporting of news was acknowledged as legitimate exercise of the fundamental right enshrined under Article 19(1)(a). However, the Court did not find ‘repeated and prolonged telecast’ of originally broadcasted content for commercial benefit⁷² protected by the Constitution.⁷³ Therefore, no straitjacket formula could be devised⁷⁴ for striking a balance between fair dealing and free speech w.r.t. match footage.

⁶⁶ Saral Minocha, ‘Copyright and the Sci-Hub/Libgen Case: A Constitutional Query’ (*SpicyIP*, 28 December 2020) <<https://spicyip.com/2020/12/sci-hub-and-libgen-up-against-academic-publishers-a-death-knell-for-access-to-research-part-ii.html>> accessed 26 June 2022.

⁶⁷ Sonal Singh, ‘Students Versus Publishers: Tussle between Access to Knowledge and Copyright’ (2019) 4 *Journal of Intellectual Property Laws* 1.

⁶⁸ Saumya Tewari, ‘Sports rights in India expected to touch \$1.3 bn by 2024’ (*Mint*, 6 March 2020) <<https://www.livemint.com/industry/advertising/sports-rights-in-india-expected-to-touch-1-3-bn-by-2024-11583490221074.html>> accessed 19 June 2022.

⁶⁹ FAO(OS) 460/2012.

⁷⁰ 2008 SCC OnLine Del 1385.

⁷¹ *ibid* [27].

⁷² Latha R. Nair, ‘How Fair Are the Fair Dealing Exceptions Under the Indian Copyright Law?’ (2009) 2 *Indian Journal of Intellectual Property Law* 171; SpicyIP, ‘For the Love of Cricket: The Delhi High Court’s Dicta on Fair Dealing Increases the Woes of News Channels’ (*SpicyIP*, 20 October 2008) <<https://spicyip.com/2008/10/for-love-of-cricket-delhi-high-courts.html>> accessed 21 June 2022.

⁷³ *ESPN Star Sports* (n 72) [27]; *see also*, *Media Works NZ Ltd. v Sky Television Network Ltd.* in the High Court of New Zealand (Auckland Registry) CIV 2007-404-5674.

⁷⁴ Anupriya Dhonchak, ‘Can User Rights Under Section 52 of the Indian Copyright Act be Contractually Waived?’ (2019) 13 *NALSAR Student Law Review* 117.

Subsequently, the defendants in *Star India Pvt. Ltd. v. Piyush Agarwal*⁷⁵ contended that disseminating ball-by-ball information related to a cricket match constituted an act in public interest.⁷⁶ The Court underscored the protectability of information under Article 19(1)(a) based on whether/not the match updates were circulated ‘at a premium’.⁷⁷

In a similar vein, the defendants in *Akuate Internet Services Pvt. Ltd. v. Star India* referred to the SC judgment in *Tata Press Limited v. Mahanagar Telephone-Nigam Limited* to make an Article 19(1)(a) argument. In the latter, the “rights of an individual to listen, read and receive” the speech concerned was considered a part of free speech and expression.⁷⁸ The Delhi HC stated that creation of exclusive/quasi-property rights in information would stand to tamper with the balance created by the Act.⁷⁹ While refusing to apply the doctrine of unfair competition on a matter governed by the Copyright Act,⁸⁰ the Court significantly ruled that such a doctrine may inevitably restrict the right to disseminate information, a critical component of Article 19(1)(a). It also cautioned courts against creating doctrines and rights that may curtail constitutional rights.

Why do copyright disputes on sports-related content become important w.r.t. free speech? *Firstly*, they fall at a unique intersection – allowing use of copyrighted works (ranging from dissemination of ball-by-ball information for commercial benefit to fan compilations) vis-a-vis determination of their transformative nature. *Secondly*, issues surrounding broadcasting rights aside, these disputes place before courts the challenge of expanding constitutional protections with ever-increasing technological interventions. Ultimately, there remains much to be desired in how courts perform the balancing act between safeguarding creative sports-related content online in the backdrop of the “commercial benefit” threshold.

b. How this Impacts the Public’s Right of Access to Information

⁷⁵ 2013 SCC OnLine Del 1030 [13].

⁷⁶ *ibid* [17].

⁷⁷ *ibid* [50].

⁷⁸ 2013 SCC OnLine Del 3344 [9].

⁷⁹ *ibid* [56].

⁸⁰ *ibid* [73].

The free speech architecture of democracies necessitates that the citizenry be better informed to take autonomous decisions.⁸¹ A conjoint reading of Articles 14, 19, and 21 of the Constitution clarifies that the freedom of expression includes the “right to receive information and ideas of all kinds from different sources” within its ambit.⁸² With the internet being a critical institution in this architecture,⁸³ constraints affecting creativity and access to information are different than before.⁸⁴ The Karnataka HC recently explained how Article 19(1)(a) includes not merely artistic expression that carries an *outward* influence on socio-political thinking of the citizenry, but also ‘inarticulate expression’ that carries a dominantly inward effect.⁸⁵

In this context, uncertainty surrounding individuals’ *ability to rely upon* the fair dealing exception carries a real impact on research and teaching. For instance, if students are unsure about the ambit of fair dealing, they may be unable to access certain images for pedagogical purposes.⁸⁶ This hampers the right to research as an intellectual endeavour.⁸⁷ While Indian courts have not discussed the interplay between Article 19(1)(a) and copyright enforcement in a wide range of suits, inconsistent application of ‘fair dealing’ hinders recipients of copyrighted works from developing on information and participating more effectively in society.⁸⁸

4. Conclusion: Reconciling the Inevitable Free Speech Conflict

⁸¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 19; Hannibal Travis, ‘Free Speech Institutions and Fair Use: A New Agenda for Copyright Reform’ (2015) 33 *Cardozo Arts and Entertainment Law Journal* 679.

⁸² *Rabinder Nath Malik v The Regional Passport Officer; New Delhi* (1967) 3 DLT 179 (FB) [24]; *Sahara India Real Estate Corpn. Ltd. v SEBI* (2012) 10 SCC 603 [25].

⁸³ *Reno v ACLU* 521 U.S. 844 (1997); Russell L. Weaver, ‘Free Speech in an Internet Era’ (2020) 58 *University of Louisville Law Review* 325.

⁸⁴ Lawrence Lessig, *The Future of Ideas* (Vintage Books 2002) 103.

⁸⁵ Bhadra Sinha, ‘Online games of skill fall under freedom of speech and expression’: Why HC junked the Karnataka Ban’ (*The Print*, 15 February 2022) <<https://theprint.in/judiciary/online-games-of-skill-fall-under-freedom-of-speech-expression-why-hc-junked-karnataka-ban/832686/>> accessed 27 June 2022.

⁸⁶ Visual Resources Association, ‘Statement on the Fair Use of Images for Teaching, Research, and Study’ <https://vraweb.org/wp-content/uploads/2011/01/VRA_FairUse_Statement_Pages_Links.pdf> accessed 28 June 2022.

⁸⁷ Lokesh Vyas, ‘Right to Research (R2R): An Independent Right with an Imposed Dependence in Copyright Law?’ (*SpicyIP*, 18 January 2022) <<https://spicyip.com/2022/01/right-to-research-r2r-an-independent-right-with-an-imposed-dependence-in-copyright-law.html>> accessed 28 June 2022.

⁸⁸ Steven D. Jamar, ‘A Social Justice Perspective on the Role of Copyright in Realizing International Human Rights’ (2012) 25 *Pacific McGeorge Global Business & Development Law Journal* 305.

Arriving at a solution to balance the competing interests highlighted in this essay is challenging, and necessitates concrete policy guidance on the importance accorded to public interest in general, and constitutional values in particular in copyright infringement cases. Both legal and enforcement uncertainties need redressal. While the former emerge from limitations within the law (such as, the absence of explanation on ‘fair dealing’), the latter emanate from difficulties in assigning legal liabilities.⁸⁹

To that end, UNESCO encourages the information society to foster and extend copyright exceptions enabling access to information and transmission of knowledge.⁹⁰ Giving effect thereto, a group of ‘like-minded IP teachers’ in India recommended replacement of the words ‘for the purposes of’ in section 52(1)(a) of the Act with the phrase ‘for purposes such as’, to make its application open-ended and address concerns surrounding access.⁹¹

Section 29.21 of the Copyright Modernization Act in Canada (2012) allows individuals to “use an existing work or other subject-matter or copy of one” for a new work. While this ‘creative reuse’ exception appears lucrative, it applies solely to non-commercial uses which are difficult to distinguish from commercial uses.⁹² Building on these developments, courts in India may envisage a ‘public interest principle’ (raised in several copyright disputes⁹³) while dealing with fair dealing cases:⁹⁴ this entails analyzing whether the use of a work is socially beneficial or not.

Additionally, scholars like Ginsburg and Tushnet have recommended a form of statutory licensing system enabling copyright owners to receive certain remuneration in exchange for copies made by users.⁹⁵ This would prevent inevitable benefits accruing to parties with resources to afford protracted legal proceedings, by allowing “permitted-but-paid” use of what legislators believe to be in public interest.

Lastly, on a structural level, Prof. Christophe Geiger suggests that there may be a need to restructure copyright as an ‘access’ right in the future.⁹⁶ Moving forward, it should

⁸⁹ Yuval Feldman and Doron Teichman, ‘Are All Legal Probabilities Created Equal’ (2009) 84 *New York University Law Review* 985.

⁹⁰ Severine Dusollier and Others, ‘Copyright and Access to Information in a Digital Environment’ (2000) XXXIV *Copyright Bulletin* 15 <<https://unesdoc.unesco.org/ark:/48223/pf0000123894>> accessed 29 June 2022.

⁹¹ Prof. Dr. N. Gopalakrishnan and Others (n 42) 2.

⁹² Canada Copyright Modernization Act 2012, s 29.21(1)(a).

⁹³ For instance, *Super Cassettes Industries Ltd. v Music Broadcast Pvt. Ltd.* (2012) 5 SCC 488 [51].

⁹⁴ Haochen Sun, ‘Copyright Law as an Engine of Public Interest Protection’ (2019) 16 *Northwestern Journal of Technology and Intellectual Property* 123, 144.

⁹⁵ Tushnet (n 3) 587.

⁹⁶ Geiger (n 12) 457.

be acknowledged that intellectual property laws acutely affect access to several public goods, and cannot be understood as a ‘technocratic discipline’.⁹⁷

⁹⁷ Samya Samtani, ‘Emerging Voices: The Shamnad Basheer Memorial Roundtable – Constitutional Law and Intellectual Property’ (The Courts and The Constitution Conference, 15 April 2022).