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Fair Use and Fair Dealing: Two Approaches to Limitations and Exceptions in Copyright Law

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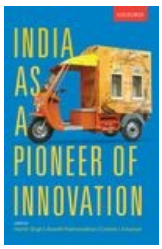

India as a Pioneer of Innovation

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CHAPTER

6 Fair Use and Fair Dealing: Two Approaches to Limitations and Exceptions in Copyright Law

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Abstract

Premised on realizing a balance between protection and access, 'limitations and exceptions' play an important role in the any copyright system. Jurisdictions around the world are generally thought to adopt one of two possible approaches to structuring limitations and exceptions: (a) the fair dealing approach, which delineates highly specific and carefully-worded exceptions with little room for judicial discretion, and (b) the fair use approach, which relies on more open-ended language and its contextual tailoring by courts. This chapter undertakes a comparative analysis of these two approaches using the Indian and US copyright systems as its focus. It shows that, although the two countries adopt different approaches as formal matter, in practice, they show far more convergence and similarity than might be predicted from the pure black letter of the law. In the process, the chapter casts doubt on the ubiquity and utility of the distinction in comparative copyright thinking.

Keywords: fair use, fair dealing, copyright, limitations and exceptions, comparative copyright law, judicial discretion

Subject: Innovation

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Copyright is predicated on realizing a balance between affording protection to creators of original expression and granting access to such expression to members of the public. Copyright law's framework of exclusive rights represents its form of protection, whereas the various 'limitations and exceptions' that the law recognizes to these rights constitute its mechanism of enabling access. Limitations and exceptions, thus being central to copyright's basic analytical framework, are hardly orthogonal to the system.

While copyright's grant of exclusive rights contributes to a country's innovation policy by providing the actors with a market-based incentive for creativity, its limitations and exceptions are equally central to that policy. First, they enable the public to access and use protected expression when doing so is determined to

be socially beneficial (for example, educational uses). In addition, and just as importantly, they enable additional creativity by allowing users and consumers to use and copy protected expression during the process of producing new expression themselves.

p. 116 Countries around the world adopt different approaches in structuring these limitations and exceptions into their copyright laws. Broadly speaking, these approaches take two forms: the 'fair use approach' and the 'fair dealing approach'. The former originated in the copyright law of the United States (US), deriving from judge-made law requiring courts to consider a variety of contextual factors before deciding whether a defendant's use/copying of a protected work qualifies as non-infringing. It relies heavily on incremental decision-making, with the law developing ex post. The latter approach, on the other hand, is followed in the copyright laws of most commonwealth countries and continental jurisdictions. Here, the copyright statute generally delineates specific types of uses and forms of copying that are categorically exempted from the scope of copyright infringement, with no need for further contextual inquiry once the use is found to fit into a particular box or category. The fair dealing approach relies much less on courts than the fair use approach, but necessitates extensive legislative tailoring of the copyright statute to ensure that a wide variety of uses are exempted over time, as conditions become varied and technology progresses.

This chapter undertakes a comparative analysis of these two approaches to structuring copyright limitations and exceptions, using the copyright law of India as the principal point of focus and comparing it to the approach adopted in the US. As traditionally conceived, the fair use approach is thought to allow for greater flexibility and adaptability in the creation of limitations and exceptions, while the fair dealing approach—being more rigid—is believed to produce greater certainty in the law. Although this dichotomy is routinely emphasized in discussions of the two approaches, we argue that a comparative study of the Indian and American approaches suggests that the divergence is far from obvious. Despite Indian copyright law's adherence to the fair dealing approach, Indian courts are reluctant to cede decision-making completely to the legislature and continue to play an important role in defining copyright's various limitations and exceptions. Indeed, at times, they even introduce new ones not present in the statute. Over time, Indian courts have interpreted the statute's fair dealing provisions and applied them in terms largely similar to the
p. 117 fair use doctrine in ↳ the US. Conversely, in the US, the flexibility of fair use has, over time, produced rigid categories of exceptions that seem to operate much like bright-line rules, rather than open-ended standards. We thus conclude that, in discussing the two approaches, copyright scholars and lawyers should be wary of broad generalizations, which depend on a variety of institutional factors that are largely exogenous to the domain of copyright law.

The first section of this chapter begins with a brief overview of the two approaches, using Indian and the US copyright law as exemplars. It sets out the broad ideas underlying each and identifies the primary analytical variables at stake. The second section examines whether the dichotomy traditionally understood between the two regimes is indeed as watertight as it is claimed to be; it suggests that copyright scholars adopt a more nuanced and contextual approach to this dichotomy, looking to the actual working of the copyright system in each instance and the institutional variables involved that tend to influence the regime's approach to limitations and exceptions. To illustrate this point, it draws on examples from both jurisdictions.

Two Models of Copyright Limitations and Exceptions

Limitations and exceptions form an integral part of any copyright system by ensuring that the copying of protected works under certain circumstances and conditions be exempted from the ambit of copyright infringement. Because copyright law is, for the most part and in most countries, statutory in origin, limitations and exceptions embedded within its working generally originate in a statutory directive. Although that feature did not apply to the US copyright law prior to the most recent copyright statute (the Copyright Act of 1976), as of today it remains true of the US no less than of almost all other copyright systems around the world. The domain in which most systems differ is in their process of determining the circumstances and conditions under which copying ought to be exempted.

The two principal models seen around the world can be broadly characterized, as introduced earlier, as the
p. 118 fair use approach and the fair dealing approach. In general terms, the fair use approach involves ↳ an ex post, case-by-case method of determining whether a particular instance of copying should be exempted from infringement, usually based on a set of open-ended standards. The fair dealing approach, on the other hand, normally entails a statute delineating specific circumstances and settings in which particular acts of copying are exempted from infringement. Unlike fair use, fair dealing provisions are normally encapsulated by bright-line rules (rather than standards) and tersely worded language. This section elaborates on these two models, using the US and India (built on the United Kingdom [UK] statute) as examples. It describes the two approaches, then details the principal institutional and structural trade-offs that the choice between the two is ordinarily thought to entail.

The Fair Use Approach: The US

Copyright protection in the US dates back to 1790—it was enacted by the first Congress to convene after adoption of the US Constitution. At that early juncture, there was no such thing as a recognized defence. But their roots did not take long to sprout. Justice Joseph Story, considering an 1841 case involving the collected papers of President George Washington, began his remarks by commenting that the case presented 'one of those intricate and embarrassing questions, arising in the administration of civil justice, in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases' (*Folsom* v. *Marsh* 1841: 44). Acknowledging that 'the lines approach very near to each other, and, sometimes, become almost evanescent, or melt into each other' (1841: 44), he articulated what would later be codified as the doctrine of 'fair use'. As later summarized, that doctrine 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster' (*Stewart* v. *Abend* 1990: 236). Over the intervening decades, courts have followed suit by vindicating the defence of fair use on many occasions and rejecting it in other instances.

A ready measure of the confusion in the courts surrounding fair use can be gleaned by looking at how the US
p. 119 Supreme Court dealt with the issue. Under the 1909 Act that governed for most of the twentieth century, ↳ the Supreme Court heard arguments about two fair use cases.[1] In both instances, the court was evenly divided, and hence unable to resolve the dispute before it. No other rulings in the copyright sphere during those decades produced that result of affirmances by an equally divided court.

Over a century later, the Congress decided to grapple with the field. As part of the process of copyright statutory revision, it commissioned a series of reports, one of which was devoted to the fair use cases that had accumulated over more than a century since Justice Story had handed down his 1841 ruling. After canvassing those opinions, Alan Latman's report (1958) outlined the broad options that the Congress could adopt: (a) maintain statutory silence and allow courts to continue to develop the field; (b) recognize fair use

in broad strokes through a statutory provision, without attempting to clarify its application; (c) specify general criteria for how it should apply; or (d) cover specific situations, such as criticism and review.

In 1976, the Congress finally enacted the product of the review that it had initiated two decades earlier. The resulting Copyright Act of 1976 took effect on 1 January 1978, and continues to govern until today. In terms of fair use, the Congress chose a combination of the final two possibilities, by enacting section 107 of the act. That provision begins with a preamble of presumptively fair uses, then sets forth four non-exclusive factors for courts to consider when evaluating fair use:

> The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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; and
>
> p. 120 (4) ↳ the effect of the use upon the potential market for or value of the copyrighted work.

Here, a word is in order specifying the relationship between the preamble and the factors that follow. First, if the utilization qualifies thereunder—for instance, as criticism or news reporting—the fair use case is bolstered. Nonetheless, it does not become presumptively fair on that basis alone and must still be evaluated in terms of the four factors that follow. At times, these considerations can push in opposite directions. *The New York Times*, for instance, is a commercial enterprise that sells copies for its own profit. Its status as a news organization favours fair use, whereas its commercial nature might incline the first factor against fair use. Obviously, a more searching inquiry is necessary.

One of the matters specified in the preamble is 'teaching (including multiple copies for classroom use)'. Along those lines, the legislative history accompanying the current act—a report from the House of Representatives (1976)—contained elaborate guidelines addressing how many copies could be made for that purpose, encompassing what percentage of a work of authorship is so produced, in the context of how spontaneous or planned the educational purpose was, and likewise setting forth other criteria. Inasmuch as those guidelines were not themselves passed into law, their footing has remained uncertain ever since.

Copyright litigation in the US is a legion; a host of cases have arisen to interpret its every feature. In the fair use domain, that litigation has been particularly pronounced. In fact, the Supreme Court has decided more copyright cases posing the matter of fair use under the 1976 Act than any other aspect of copyright law. It is a measure of the dissension in the field that practically every such case arose in the posture of a district court holding reversed by the court of appeals and, in turn, reversed by the Supreme Court, usually with a dissenting opinion at the highest level.

We have already called out the preambular language of 'teaching (including multiple copies for classroom use)' and the House of Representatives report guidelines for its implementation. It remains to be added that litigation results regarding photocopying for research and teaching purposes have been spotty. One of the
p. 121 pre-1976 cases resulting in an affirmance by an equally divided Supreme Court arose precisely ↳ in that context (*Williams & Wilkins Co.* v. *United States* 1975). The result was to validate photocopying of scholarly

journals undertaken by the National Institutes of Health (NIH). But the opposite result emerged from a different circuit court some years into the pendency of the current Act. In 1994, the Second Circuit ruled that fair use did not protect making copies of articles out of the *Journal of Catalysis* and similar scholarly materials for the purpose of aiding a private corporation's scientific research. A significant intervening development was the advent of the Copyright Clearance Center, which offered affordable licences for such material as the *Journal of Catalysis* that had not been available to the NIH decades earlier. Two years later, the Sixth Circuit likewise ruled against a service producing 'course packs' at the behest of university professors. Those course packs consisted largely of excerpts from journals and books that were relevant to a single subject being taught in a university course; their designation 'for classroom use' failed to win favourable treatment. Nonetheless, when the wheel turned once again, the opposite result inured. Cambridge University Press challenged Georgia State University's 2009 copyright policy, which allowed electronic copies to be made of individual chapters from various books for student use. The district court initially validated the 'course packs', ruling them to be protected as fair use (*Cambridge Univ. Press* v. *Becker* 2012). On appeal however, the Eleventh Circuit reversed the district court's opinion, finding that such use by the university did not amount to fair use (*Cambridge Univ. Press* v. *Patton* 2014). It should be added that the Copyright Clearance Center granted licences for about 60 per cent of the works in Cambridge University Press's catalogue—but only print copies, not electronic copies. This thumbnail sketch of divergent results in one discrete field suffices to highlight the shifting sands over time in fair use determinations.

The other pre-1976 case resulting in an affirmance by an equally divided Supreme Court arose in the context of parody (*Columbia Broadcasting System, Inc.* v. *Loew's Inc.* 1958). Famous comedian Jack Benny produced a half-hour television (TV) show in 1952, burlesquing the motion picture *Gaslight*. When sued, he defended on the grounds of parody. The Ninth Circuit denied that defence, as it later denied the fair use defence offered by a comic book portraying Mickey Mouse and other Disney characters 'as active members of a free
p. 122 thinking, ↳ promiscuous, drug ingesting counterculture' (*Walt Disney Productions* v. *Air Pirates* 1978: 753). Subsequently, the Supreme Court validated the parody defence proffered by a rap group that replicated much of the music and lyrics from the country song 'Pretty Woman' (*Campbell* v. *Acuff-Rose Music, Inc.* 1994). In that context, it highlighted the difference between protected 'parody' and less protected 'satire'—the former comments on the original author's work, whereas the latter 'has no critical bearing on the substance or style of the original composition' (*Campbell* v. *Acuff-Rose Music, Inc.* 1994: 580). Of course, that line itself is often difficult to draw.

Each of the four factors set forth in the statute has a tendency to turn into a bright-line rule. Thus, at one point, utilizations that were commercial tended to be disfavoured under the first factor, and to routinely lead to a denial of fair use. Copying from unpublished works tended to be disfavoured under the second factor, and to routinely lead to a denial of fair use. Copying the totality of a work works tended to be disfavoured under the third factor, and to routinely lead to a denial of fair use. Depriving the copyright owner of income it would have otherwise earned tended to be disfavoured under the fourth factor, and to routinely lead to a denial of fair use.

Both the Congress and the Supreme Court have tried to halt that tendency in its tracks. In terms of the solicitude shown to unpublished works under the second factor, a series of court rulings threatened to hold all quotations from unpublished manuscripts categorically unfair. The matter got so dire that the Congress intervened in 1992. In the only amendment to the wording of the statutory provision (17 U.S.C.A. §107 [1992]), it added the following qualification at the end: 'The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.' In a like measure, a unanimous Supreme Court case (*Campbell* v. *Acuff-Rose Music, Inc.* 1994) commanded that all factors be taken into account, rejecting any bright-line rule derived from a single factor.

On account of these interventions, commercial utilizations today stand a chance to be characterized as fair use. Under the first factor, for instance, an artist who produced appropriation art by engaging in wholesale

copying from the products of the plaintiff photographer, which the defendant in turn sold for millions of
p. 123 dollars, prevailed on ↳ his fair use defence (*Blanch* v. *Koons* 2006). Under the second factor, a service that copied unpublished student papers to test them on behalf of schools through a 'plagiarism detection service' likewise prevailed in its fair use defence (*A.V. ex rel. Vanderhye* v. *iParadigms, LLC* 2009). Under the third factor, a group of university libraries that copied whole books in their collections proved similarly victorious (*Authors Guild, Inc.* v. *HathiTrust* 2014). Further, under the fourth factor, *Playboy* magazine prevailed when it reproduced an old high-school photograph of one of its Playmates of the Month without paying the photographic service the fee it typically charged for all reproductions (*Carla Calkins* v. *Playboy Enterprises Intern., Inc.* 2008).

Integral to each of the cases just canvassed is that the use in question qualified as 'transformative'. Deriving from a scholarly article by Judge Pierre Leval (1990) that was later adopted by the Supreme Court, this aspect enquires into whether 'the new work merely supersedes the objects' of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message. We return to the transformative test later. Unfortunately, its application has been so broad as to qualify it as almost all things to all people.

Having articulated four factors, how does the statute weigh each? In other words, what if factors 1 and 3 favour fair use, but factors 2 and 4 are to the contrary? What if factor 4 strongly favours fair use, factors 1 and 2 are weakly to the contrary, and factor 3 is neutral? Scores of permutations are cognizable.

Unfortunately, the statute is silent as to relative weight. Indeed, the statute itself does not foreclose the application of additional factors, unenumerated in the congressional language. Courts must therefore consider each of the four factors, along with additional circumstances, and apply their own calculus as to the ultimate resolution. Cases are decided ad hoc, with no certainty in advance how a given case will pan out.

The Fair Dealing Approach: India

India's current copyright law is contained in the Copyright Act of 1957. This was the country's first post-
p. 124 Independence copyright legislation and replaced the Copyright Act of 1914, which was enacted by the ↳ British colonial government for India. The Copyright Act of 1957 drew extensively from its UK counterpart, the UK Copyright Act of 1956. Since the UK Act adopted a fair dealing approach to limitations and exceptions, the Indian statute followed suit in large measure. Sections 6 through 10 of the UK Act dealt with that statute's various limitations and exceptions. While some provisions consciously used the phrase 'fair dealing', others merely described particular instances of copying with some level of detail and went on to exempt those acts from infringement altogether.

The Indian Copyright Act of 1957 consolidates its various limitations and exceptions in one principal section of the statute, section 52. Dealing with actions that 'do not constitute copyright infringement', this section contains what are in essence two principal kinds of exceptions to infringement. The first kind involves what are true fair dealing provisions, which qualify their description of the activity that is exempted by the phrase 'fair dealing', thereby suggesting that the activity described is entitled to an exemption only when assessed to be a fair dealing under the law, not simply when found to have been undertaken as a factual matter. The second kind does just the opposite. These latter provisions merely describe an activity in some detail, and allow the exception to be invoked upon a mere showing that the factual elements identified in the provision (in its description of the activity) have been met. Although these latter types of exceptions, strictly speaking, do not qualify as fair dealing, inasmuch as they are interspersed amongst the true fair dealing ones, the rules of construction and interpretation that courts apply to one generally carry over to the other as well. For the purposes of our discussion, we treat them both as falling within the fair dealing approach, and in situations where the precise construction of the statute makes a difference, we draw out that aspect.

Consider the following examples, illustrative of the two kinds of exceptions just described. Section 52(b) exempts from infringement the following action:

> [A] fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events—
>
> (i) in a newspaper, magazine or similar periodical, or
>
> (ii) by broadcast or in a cinematograph film or by means of photographs.

p. 125 As should be obvious, the provision specifies a particular kind of copying that qualifies for the exemption: copying of a work for news reporting. It further specifies the factual contours of the activity that meets the requirements, namely that the news reporting must be of 'current events' and be in a periodical or in a broadcast, film, or photograph. Yet, as a preliminary, it requires the court—or other decision-maker—to be assured that the copying in question was not just any copying but a 'fair dealing'. This raises the obvious question of what exactly a fair dealing is, and how a court is to go about determining the proposition. Sadly, the statute's definition section provides no guidance whatsoever on that score.

Since the Act of 1957 drew extensively—in structure, design, and substance—from its UK counterpart, Indian courts and lawmakers quite naturally looked to English courts to figure out what exactly fair dealing meant. One of the leading cases on fair dealing in the UK sought to define and lay down a formula for courts to apply in giving the words 'fair dealing' operational content in individual cases. *Hubbard* v. *Vosper* (1972) involved an interpretation of section 6 of the UK Act in an interesting posture. The Church of Scientology had commenced an action for copyright infringement (through its founder, L. Ron Hubbard) against a former member who had published a book criticizing the organization. The plaintiff alleged that the defendant's book contained material that had been copied from the plaintiff's own books and writing. The defendant raised the defence of fair dealing and succeeded. Writing for the Court of Appeal, Lord Denning—a legendary Law Lord—took the opportunity to clarify the scope of the fair dealing defence and its meaning:

> It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said
> p. 126 and done, it must be a matter of impression. As ↳ with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide. In the present case, there is material on which the tribunal of fact could find this to be fair dealing. (*Hubbard* v. *Vosper* 1972: 94)

Lord Denning's observations have since been taken to represent the approach that courts are to use in determining when a defendant's copying is fair, even when the other statutorily delineated factual elements have been satisfied. Indian courts have, for the most part, taken *Hubbard*'s observations to represent the principal way of interpreting and applying fair dealing even under the act of 1957. Notwithstanding that subsequent UK courts have sought to cabin Lord Denning's observations, Indian high courts continue to treat his elements and factors as the principal bases with which to approach section 52's fair dealing provisions. Indeed, on occasion, they have expanded on his insights and added additional elements.

Outside of the true fair dealing provisions, section 52 also contains exceptions which, as noted earlier, specify certain kinds of copying and designate them as non-infringing and as a factual matter. These provisions require little subjective judgement on the part of courts, as to their fairness or otherwise. Section

52(c) furnishes a good example. It provides that 'the reproduction of a literary, dramatic, musical or artistic work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding' is not an infringement. In these kinds of provisions, a defendant must merely establish (and the court must be satisfied) that the precise contours of the statutory exception have been satisfied: once this showing is met, the activity is treated as non-infringing. No further balancing or analysis is required on the part of the court.

Although the first category of exceptions may seem markedly different from the second insofar as they delegate the determination of fairness to courts, both categories together exhibit an important common feature that typifies the fair dealing approach as a whole: courts are meant to interpret the circumstances and conditions mandated by the statutory exception with a heightened level of rigidity. To take our examples from the Indian statute, courts are to thus interpret the contours of 'a periodical' and what
p. 127 constitutes a 'judicial proceeding' ↳ in equally strict and narrow terms. In referring to this fundamental process of construction—applicable to all fair dealing exceptions—one English court thus characterized the fair dealing approach as accepting that the provisions 'define with extraordinary precision and rigidity the ambit of various exceptions to copyright protection' (*Pro Sieben Media AG* v. *Carlton UK Television Ltd* 1997: 516). Courts have very little leeway in expanding these provisions based on what might be deemed independently reasonable under the circumstances.

A recent decision of the Delhi High Court vividly illustrates the facial rigidity of the fair dealing approach. Applying the exemption provisions of the Indian Copyright Act, *Super Cassettes Indus. Ltd.* v. *Chintamani Rao* (2012) confronted whether subsections 52(1)(a) and (b) could immunize the defendant's actions from liability, insofar as those activities related to the plaintiff's protected cinematographic films and sound recordings. Those two subsections define fair dealing to apply to specified utilization of a 'literary, dramatic, musical or artistic work'. Neither makes mention of a cinematographic film or a sound recording, both of which, the defendant's lawyer argued, are in a sense derivative of traditional 'literary, artistic, dramatic, and musical works', concluding on that basis that section 52 should be liberally and purposively construed to embrace these additional categories of (not specifically enumerated) works. The court rejected the defendant's argument, and in so doing elaborated on how it conceptualized its task in interpreting the act's various exceptions and limitations:

> Section 52 carefully and exhaustively enlists various actions which would not constitute infringement of copyright in different classes of works and the limits on such use.... [The] exceptions in Section 52 are carefully crafted and are use-specific as well as work-specific. Each clause makes clear both—the type and class of work to which it applies, and the particular exempted use of such work. (*Super Cassettes Indus. Ltd.* v. *Chintamani Rao* 2012: 22)

The court thus interpreted section 52 to be exhaustive in structure, with little room for further elaboration or expansion by courts independent of legislative authorization. It went on to conclude that 'Parliament deliberately and consciously chose the class of works in relation to which it permitted the exploitation of the
p. 128 copyright for specific purposes only' ↳ (*Super Cassettes Indus. Ltd.* v. *Chintamani Rao* 2012: 22). In addition to interpreting the rigidity of the provision to be a conscious effort to limit the applicability of the exceptions, the court also sought to justify it substantively, as embodying the legislature's calculated wisdom relating to the types of works in question: 'There is very good reason for not including cinematograph films and sound recordings in clauses (a) and (b) in Section 52(1) of the Act. Being derived works, cinematograph films and sound recordings involve much greater financial investment when compared to investment that may have been made in the creation of original literary, dramatic, musical and artistic work' (*Super Cassettes Indus. Ltd.* v. *Chintamani Rao* 2012: 23).

The court's reasoning in the case aptly illustrates everything that the fair dealing approach entails, at least in theory: (a) a narrow, textualist, and rigid reading of the wording in each statutory exception, accompanied by no effort to exercise judicial discretion or supplementary lawmaking on a delegated basis;

(b) a belief that the power for all lawmaking in relation to such exceptions and limitations inheres in the legislative branch, with the courts doing no more than applying the law as articulated by the legislature; (c) exercising discretion only when expressly delegated, with the obvious area of delegation being the determination of fairness in relation to the copying; and (d) the tendency to treat the legislative guidance embodied in the statute as embodying important trade-offs and choices that ought to be followed and discerned, even when not obvious or apparent. *Super Cassettes* thus epitomizes the fair dealing approach which, as noted previously, owes its legacy to the rules formulated by the English common law. As it turns out, however, a subsequent appeal overruled this decision (*India TV Independent News Service Pvt. Ltd. & Ors.* v. *Yashraj Films Pvt. Ltd.* 2013). The appellate on *Super Cassettes* decision abandoned the fair dealing approach altogether, an issue that the next part addresses. For now, what is essential to note is that the Delhi high court's opinion in this matter epitomizes the fair dealing approach to which Indian courts were traditionally accustomed, drawing on English fair dealing cases.

Under the fair dealing approach, then, primary responsibility for limitations and exceptions vests with the
p. 129 legislature. At least in theory, any updating of copyright law in relation to new technologies or means ↳ of copying and exploitation must come about through amendment of the statute's text. The power of courts is limited to determining when a given exploitation qualifies as 'fair'; yet, even this power arises solely when the statutory exception in question expressly sets forth the phrase 'fair dealing' to qualify its application.

Trade-offs

Having seen what the two different approaches entail, as illustrated by examples of cases decided in India and the US, it remains to set forth the principal structural and substantive trade-offs that the choice of one model/approach over the other is thought to entail. Three important trade-offs are identified and discussed below.

Guidance

Of the two approaches, the fair use model is often criticized for its inability to provide actors with sufficient guidance about the extent to which their actions are protected against copyright infringement in advance. Since fair use entails a standards-based case-by-case analysis, actors are seen to be dependent on having courts adjudicate their claims in order to obtain the requisite certainty. Given the costs of litigation, the widespread belief is that individuals are encouraged to settle their claims, even if they are legally well grounded; and they are equally incentivized to obtain needless licences, even as to uses that should qualify as fair use. Fair dealing, on the other hand, is thought to do just the opposite. By delineating the scope and extent of the exception with sufficient certainty upfront, users are believed to be in a position to plan their activities in advance, without having to worry about copyright infringement. In short, fair dealing is believed to provide users of copyrighted works (that is, potential defendants) with better guidance than fair use.

Flexibility

Fair use is considered more flexible due to the open-ended character of the four-factor assessment, while
p. 130 the fair dealing approach can potentially become rigid in its application. Flexibility brings along ↳ with itself reduced certainty, which in turn has its own costs and benefits. While fair use is believed to provide actors with insufficient guidance owing to its uncertainty, this reduced certainty allows the approach to adapt better to new circumstances and contexts. The rigidity of fair dealing allows actors to determine the scope and extent of different exceptions with greater clarity. Yet, this rigidity impedes (indeed, disallows) courts from adapting these exceptions to new contexts and areas incrementally, as technology and circumstances demand. Fair use, on the other hand, has a clear benefit in this regard, allowing copyright law's limitations and exceptions to develop to meet the needs of the times more expeditiously. Fair use is thus thought to be significantly more flexible and adaptable than fair dealing. Indeed, some have argued that it is the flexibility and open-endedness of fair use that has enabled various fair-use-dependent industries to thrive and flourish in the US.

Lawmaking Institution

The third important trade-off between the two approaches is institutional. It relates to the institution that is recognized to have primary authority in creating exceptions and limitations to copyright's exclusive rights and expanding or extending them to new scenarios. The fair dealing approach emerges from the understanding that the legislature retains primary authority over all of copyright law, including the structure and content of limitations and exceptions, and that courts are to do no more than apply these exceptions to individual cases. Fair use, on the other hand, is conceptualized as a form of deputized lawmaking, wherein the US copyright statute delegates to courts the task of applying the four general principles (enumerated in the statute) to new situations and contexts and, in the process, making new law for those contexts and areas. Unlike fair dealing, fair use does not begin with the premise of legislative supremacy for the creation of copyright limitations and exceptions.

The Distinction in Practice

The previous discussion of the two approaches to copyright exceptions and the various structural trade-offs
p. 131 that they entail would lead one to ↳ predict that, in practice, several differences are likely to emerge between the copyright systems choosing one over the other. In systems adopting the fair dealing approach, one might predict that courts would tend to follow the letter of the law strictly, thereby causing the law to lag behind technological and socio-economic changes that have transpired since the statute was most recently amended. This discussion would also suggest that copyright limitations and exceptions remain a closed set in this system, with courts actively cabining their own creativity and innovativeness in crafting new exceptions or in extending the logic of pre-existing exceptions to new situations. Correlatively, as to systems adopting the fair use approach, it predicts that they would be more creative in crafting new exceptions to new situations, and allow the law to keep up more rapidly with changes in technology. In so doing however, the law would compromise its certainty to a great degree, providing minimal guidance to actors, who would have to wait on a case-by-case adjudication before knowing if their acts of copying were, in fact, exempted from infringement.

In practice, however, as we show in the following paragraphs, these predictions prove to be grossly exaggerated in the two systems we compare. Despite India's adoption of a fair dealing approach, its courts have proven to be fairly innovative in interpreting the text of the statute's exceptions and in crafting new exceptions. At the same time, the US courts have strived to inject a good degree of predictability into the

working of the fair use doctrine and, over time, have developed discernible patterns that provide actors with a fair measure of guidance in given, concrete situations.

Creativity despite Constraints: The Indian Example

Despite what the fair dealing approach—in theory—suggests that courts should be doing when interpreting and applying the statutorily enumerated exceptions, Indian high courts have been unable to stifle their creative impulses altogether. The opening created by the statute's use of the phrase 'fair dealing' to qualify certain provisions, in practice, has allowed courts to introduce a variety of non-statutory and altogether new considerations into the calculus, even in circumstances where it might appear as though the legislature consciously sought to ensure against this eventuality.

p. 132 The English Court of Appeal's observations in *Hubbard*, discussed earlier, have had an undue influence on the way in which Indian courts approach the question of fair dealing. Indeed, as commentators point out, English courts applying the statute's fair dealing provisions after *Hubbard* have failed to exercise the level of equitable discretion that Lord Denning tasked courts with in fair dealing cases.[2] Courts there have instead chosen to adhere to a strict construction of the provisions in question, largely unmoved by what their counterparts in the US have been doing under the rubric of fair use. This is, however, hardly the case in India.

Indian courts that have given sufficient thought to the issue have used Lord Denning's dicta in *Hubbard* to undertake a contextual scrutiny of the defendant's copying and measure its fairness against the consequences of allowing the copyright owner to prevent such copying. The case of *Civic Chandran* v. *Ammini Amma* (1996) is a good example. It involved a well-known dramatic work from which parts and scenes had been copied by the defendant, who went on to create and produce a 'counter drama' intended to 'to criticise the idea propagated by the drama and to expose to the public that the drama has failed to achieve the real object intended to be achieved by writing the same'(*Civic Chandran* v. *Ammini Amma* 1996: 684). When the plaintiff commenced a claim of copyright infringement, the defendant raised the defence of fair dealing under section 52(1)(a)(ii) of the act. Relying in large part on *Hubbard*, the Kerala High Court undertook a detailed comparison of the two works to find, eventually, that they had very different purposes and intentions and that allowing the copyright owner to obtain an injunction against the use would impact the defendant's free speech rights. Paying only limited attention to the text and legislative history, the court went on to allow the defendant's fair dealing defence. Central to the court's reasoning and holding was its conception of what fairness entailed, as allowed for by the 'fair dealing' requirement of the statute.

Other Indian courts have followed this trend and relied on the dictum in *Hubbard* to undertake a balancing approach to the question of fairness. A more recent and far-reaching trend in this same direction has, however, been some courts' willingness to treat fair dealing as entirely synonymous with fair use. The
p. 133 decision of the Delhi High Court in ↳ *The Chancellor Masters and Scholars of The University of Oxford* v. *Narendra Publishing House and Ors.* (2008) captures this trend nicely. The plaintiff published several school textbooks, in particular one on mathematics written by a prominent Indian scholar that contained a series of questions for students. The defendants had published their own guidebook which sought to respond to the plaintiff's questions. It reproduced those questions and provided detailed answers/explanations to them —all without the plaintiff's permission. Consequently, the plaintiff brought an action for copyright infringement. In response however, the defendant claimed that his actions were protected under section 52 of the Copyright Act.

Here is where things became interesting. In dealing with the plaintiff's defence under section 52, the court began by characterizing it as the 'fair use' exemption. Lest it be thought that the court's characterization was merely semantic or nominal, the court then proceeded to detail the purposes of the fair use doctrine,

quoting from the well-known article by Second Circuit Judge Pierre Leval (1990). It then proceeded to discuss the US case law on fair use, including *Folsom* v. *Marsh* (1841), *Universal City Studios* v. *Sony* (1984), and *Harper & Row Publishers* v. *Nation* (1985), to distil the core principles of fair use. Somewhat ironically, the court's analysis nowhere noted the reality that fair use in the US does today find mention in the copyright statute, which is in turn worded in vastly different terms from the Indian and UK statutes. After then citing English and Indian cases on the question of copyright exceptions, the court observed:

> The doctrine of fair use then, legitimises the reproduction of a copyrightable work. Coupled with a limited copyright term, it guarantees not only a public pool of ideas and information, but also a vibrant public domain in expression, from which an individual can draw as well as replenish. Fair use provisions, then must be interpreted so as to strike a balance between the exclusive rights granted to the copyright holder, and the often competing interest of enriching the public domain. Section 52 therefore cannot be interpreted to stifle creativity, and the same time must discourage blatant plagiarism. It, therefore, must receive a liberal construction in harmony with the objectives of copyright law. Section 52 of the Act only details the broad heads, use under which would not amount to infringement. Resort, must, therefore be made to the principles enunciated by the courts to identify fair use. (*OUP* v. *Narendera Publishing House* 2008: 396)

p. 134 Not surprisingly, the 'principles' that it identified were the four factors from the US fair use cases, today codified in 17 U.S.C. §107. Applying them to the facts of the case, the High Court concluded that the defendant's use was indeed a fair use/fair dealing, thus exempt from copyright infringement by definition. Later opinions, especially of the Delhi High Court, have tended to follow the same approach.

This 'liberal' approach, in effect, blurs the divide between fair use and fair dealing elaborated earlier. It suggests that, from the simple reality that both approaches incorporate the notion of fairness into the analysis, Indian courts have come to treat them as interchangeable, disregarding the traditional dichotomy which English law had relied on and which continues to influence the approach of English courts to this day.

Some Indian courts have taken this liberal approach one step further and have read into the Copyright Act exceptions that find no statutory basis whatsoever. One of these exceptions finds no recognition even under the US fair use principles, where courts are more willing to depart from the language and structure of the statute. This is the defence of de minimis. Here, we return to the *Super Cassettes* case discussed earlier. The decision described in the previous section was handed down by a single judge of the Delhi High Court, and the matter was appealed to a full bench of that court, which overturned the decision. This was also seen in the case of *India TV Independent News Service Pvt. Ltd. & Ors.* v. *Yashraj Films Pvt. Ltd.* (2013). While it does not appear that the full bench overturned the single judge's approach to interpreting section 52, the panel nonetheless reversed the earlier decision by reading into the copyright statute an independent defence of de minimis copying.

The panel's decision begins with a reference to multiple US fair use decisions and the observation that 'even in India fair use is determined on the same four factors'. Nonetheless, the court observes that, quite independent of fair use, copyright law ought to accommodate minimal copying under the well-known legal maxim *de minimis non curat lex* ('the law does not concern itself with trifles'), especially in situations such as the one before the court, where the defendant had taken minimal amounts of protected expression from the plaintiff's protected works with no obvious economic harm. In its discussion of the issue, the court
p. 135 observed that the US courts had considered the question and rejected ↳ the adoption of a de minimis defence variously as part of the substantial similarity analysis, as part of fair use, and as a stand-alone exception. Nonetheless, the panel parsed the US fair use decisions to note that the de minimis idea was still at play, either as a part of the fourth fair use factor or as a separate factor of fair use.

To support its conclusion that the defence had not been affirmatively foreclosed in the US, the panel's opinion further cited an article authored by one of us, which analysed over 60 fair use opinions, to conclude that the fair use doctrine was sufficiently malleable to allow courts to decide cases on multiple, often non-statutory factors. The court used the conclusion of the article to infer that the fair use doctrine was indeed compatible with a de minimis defence. When also presented with a treatise on copyright law, again authored by one of us, which argues that there is no viable de minimis defence in the US, the court disagreed with the treatise on its interpretation of the US law and further suggested that the treatise writer's argument was based on his perception of an inconsistency in the case law, which certainly did not suggest the lack of a 'viable' de minimis defence. The opinion then proceeded to set forth why a de minimis defence is indeed necessary for copyright law and crafted a new de minimis defence against copyright infringement premised on a five-factor test, which it then applied to the facts of the case to conclude that the defendant's actions did not amount to copyright infringement.

What is telling about the court's opinion is its willingness to depart from the text and structure of the Indian Copyright Act, as well as the fortitude with which it undertook an analysis of the US copyright law, disagreeing with the commonly accepted views therein, and thereafter explicitly entered the realm of policymaking to create a new non-statutory exception.

To be sure, this decision is still an outlier in the Indian copyright landscape.[3] Yet, it vividly illustrates three
p. 136 important points for our analysis: ↳ First, while the fair dealing approach suggests that courts are to confine themselves to interpreting and applying the text of the statute rather than making new law, the extent to which this mandate forms an actual constraint can vary from one copyright system to another. In England, fair dealing continues to constrain courts—but the same phenomenon does not seem to be the case in India. Second, whereas fair dealing is indeed structurally different from fair use, the reality is that fair dealing, too, gives courts equitable discretion in applying the provision, allowing courts to rely on variables and factors that, for the most part, track the US fair use jurisprudence. This explains how Indian courts have consciously conflated fair use and fair dealing in their analysis, relying on observations from *Hubbard*. Third, the extent to which the dichotomy continues to remain depends, it would appear, in large part on variables external to copyright law as such. Included under this rubric is the extent to which the norms of legislative supremacy and/or textual adherence influence judicial decision-making. In the UK, these norms are strongly entrenched and are routinely followed by courts. This is far from being the case in India, where the judiciary has taken an active role in policymaking and crafted Indian law in multiple areas. It was perhaps naive to expect that they would do otherwise in the realm of copyright law.

Patterns Despite Open-ended Factors: The Countervailing US Experience

The Congress has set forth four factors to consider in calibrating whether any particular usage qualifies as
p. 137 fair use, and the Supreme Court has ruled that all factors must be considered in any given case. ↳ Therefore, as is frequently remarked, the determination of fair use in the US is, of necessity, ad hoc; an infinite variety of circumstances may affect the resolution of any concrete fact pattern.

Although true on paper, this summary fails to reflect all the experiences. The reality of applying fair use is that a variety of postures have arisen in which given exploitations have been vindicated—almost as if the legislature had specified in advance that this particular channel of exploitation should qualify as 'fair dealing'.

Let us begin with a narrow category—utilizations of copyrighted material that takes place in the context of a judicial proceeding, whether in the courtroom or in contemplation of a future court appearance. Consider *Bond* v. *Blum* (2003), an infringement case arising out of a child custody proceeding that unfolded in state court. Here, one William Slavin alleged that his ex-wife's present husband, William Bond, did not maintain

a household suitable for the former's children with the ex-wife. To establish this, Slavin's attorneys introduced into evidence in the state court proceedings a manuscript authored by Bond describing how, at the age of 17, he planned and committed the murder of his father, fooled the police about his mental state, used the juvenile system to get off with merely a 'slap on the wrist', and then recovered the proceeds of his father's estate, all without any remorse. Bond explained in the manuscript, 'I wanted my father's money' (*Bond* v. *Blum* 2003: 393). That manuscript was autobiographical, inasmuch as Bond himself had been convicted in juvenile court of (and temporarily held in a mental facility for) the very crime described in *Self-Portrait of a Patricide: How I Got Away with Murder*. In response to Bond's complaint of copyright infringement, the defendants pointed out that they had no intent to exploit the book's manner of expression for any purpose whatsoever. The Fourth Circuit roundly vindicated fair use, labelling the infringement claim frivolous (and awarding the defence its attorney's fees as well).

Consider next *Healthcare Advocates, Inc.* v. *Harding, Earley, Follmer & Frailey* (2007), another infringement case arising out of underlying proceedings, this time for trademark infringement and trade secret misappropriation. After Healthcare Advocates initiated that underlying case, defence counsel Harding, Earley, Follmer & Frailey investigated the claims against its client by accessing archives stored on the
p. 138 Internet that chronicled the way plaintiff Healthcare Advocates had displayed its ↳ purported trademark on the date specified in the underlying complaint. In response, Healthcare Advocates filed a new case, alleging that the attorneys' investigation amounted to copyright infringement. This case likewise vindicated fair use by roundly rejecting the infringement claim: 'It would be an absurd result if an attorney defending a client against charges of trademark and copyright infringement was not allowed to view and copy publicly available material, especially material that his client was alleged to have infringed' (*Healthcare Advocates, Inc.* v. *Harding, Earley, Follmer & Frailey* 2007: 637).

One could multiply these examples. Parallel to the first instance of the murderer's autobiography, another case vindicated a police investigator's downloading of photographs from a victim's website to use in the course of a murder investigation (*Shell* v. *City of Radford, Va.* 2005) and a different case validated a TV show's display of the O.J. Simpson murder trial, even though it included a copyrighted photograph that had been admitted into evidence (*Kulik Photography* v. *Cochran* 1997). Parallel to the second instance of counsel defending a different case, another court vindicated the use of software produced by the adverse party during a mediation session as within the fair use defence (*Moran* v. *deSignet Int'l* 2008).

Nonetheless, there is one exception to the above rule: with respect to exhibits and demonstrative evidence commissioned for the express purpose of the subject litigation, it is unfair for the commissioning party to shirk its payment obligations and rely on the fair use doctrine to use the resulting products in court proceedings. After all, 'if works intended for use in litigation could be freely copied without payment to or permission from the copyright holder, there soon would cease to be any viable marketplace for such works' (*Images Audio Visual Prods., Inc.* v. *Perini Bldg. Co., Inc.* 2000: 1086).

Now, let us move to a category of wider application—comparative advertising. *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.* (1978) held reproduction of the cover from the plaintiff's copyrighted magazine fair use in a comparative advertisement for the defendant's magazine. *Sony Computer Entertainment Am., Inc.* v. *Bleem, LLC* (2000) arose in the context of defendant Bleem's 'software emulator', which allowed purchasers of game cartridges playable on Sony's PlayStation console to operate the games
p. 139 instead on a personal computer; it allowed ↳ Bleem to feature on the packaging of its box a 'screenshot' from Sony's copyrighted game, showing the superior resolution achievable on a computer screen as compared to a TV set hooked up to the PlayStation. The Ninth Circuit emphasized that Bleem's emulator competed not with Sony's copyrightable software for its games but instead with Sony's hardware, namely the uncopyrightable PlayStation console. In fact, Bleem's product could even stimulate further sales of Sony's software (even if it dampened Sony's sale of its hardware console, a harm that stands outside

copyright protection). In line with that sensibility, it should be added that the Federal Trade Commission has issued a ruling praising the social utility to consumers of truthful comparative advertising.

Moving beyond the realm of comparative to 'pure' advertising, *S&L Vitamins, Inc.* v. *Australian Gold, Inc.* (2007) extended the vector of fair use. The plaintiff in that case manufactured tanning lotions that were sold to salons under contractual provisions barring Internet resale; the defendant (who was not party to those contracts) obtained some of the plaintiff's product and offered it for sale over the Internet; its website included thumbnail pictures of the product, including its copyrighted label. The district court held that the only market usurped by the defendant's conduct was for the uncopyrighted tanning lotion, not for the copyrighted artwork on the label. It therefore validated as fair use the defendant's truthful advertising of products that it actually offered for sale.

As a final exemplar, let us encompass a very capacious purpose for which works protected by copyright can be used—to combat racism. Although the US Constitution, adopted in 1789, ratified the institution of chattel slavery that treated black slaves as less than human beings, the decisive event in the nation's history was the next century's Civil War, which abolished slavery through a series of constitutional amendments. No feature is more profound in the nation's consciousness than the resulting mandate of equal protection under law for all citizens. Remedial measures continue until the present day to overcome the stain from that founding sin of slavery. One such measure, driven by private effort and creativity rather than proactive state action, is the remodelling of literary works long considered classics in American society with a stark emphasis on the racist undertones in such earlier works. The case that follows portrays the tussle between such creative and purposeful transformation, and the copyright in the earlier work.

p. 140 This case involved a challenge brought by the copyright owner of the largest seller of all time among literary works in the history of the US (short of the Bible, which stands outside copyright protection). In response to Margaret Mitchell's classic, *Gone with the Wind*, with its sprawling tale of life amongst the white gentry of the antebellum South (that is, those states of the US before the Civil War that relied on the institution of slavery), Alice Randall composed *The Wind Done Gone*, recounting the same plot developments revolving around the same characters, but told from the perspective of the enslaved underclass. For instance, where the former book recounts an amusing poker game in which a gentleman overplays his hand and ends up losing one of his minor slaves, in the latter's hands, the same events emerge as a heart-wrenching tale of a son wrested away from his mother's love into a hell of maltreatment. In countless other particulars, Randall 'exploded' the racist underpinnings of this classic work of American literature. The Eleventh Circuit validated the utilization as fair use (*Suntrust Bank* v. *Houghton Mifflin Co.* 2001). Its ruling stands in contrast to decisions of similar vintage from sister circuits. For instance, when a different author, going by the name 'Dr. Juice', employed the almost equally famous *Cat in the Hat* children's book to make a social commentary about the celebrated O.J. Simpson murder trial, the Ninth Circuit refused to accord the same 'parody' fair use defence that protected Alice Randall (*Dr. Seuss Enterprises* v. *Penguin Books USA, Inc.* 1997). When another author based a trivia-quiz book on the most famous TV show of the era, *Seinfeld*, the Second Circuit withheld the fair use imprimatur for the resulting *Seinfeld Aptitude Test* (*Castle Rock Entertainment, Inc.* v. *Carol Publishing Group* 1998). The latter two cases lacked the distinctive anti-racist cloak that protected and lent transformative character to the first instance.

But protection for copying undertaken to combat racism is not limited to bestsellers and other highly famous works. A small local police station put out a monthly newsletter with a tiny circulation limited largely to interested parties. One month, the bulletin included one officer's allegory contrasting people of various colours—the not-so-subtle subtext being that African Americans as a class constituted coddled criminals. A crusading newspaper reproduced the article in toto—of necessity thereby exposing it to a vastly
p. 141 larger readership. When the ↳ aggrieved officer tried to vindicate his copyright in the piece, the district court held that the public interest in viewing his exact expressions made it fair use for the defendant to reproduce the whole (*Belmore* v. *City Pages* 1995). It is hard to reconcile that ruling with the decision some

years earlier from another court (*Salinger* v. *Random House, Inc.* 1987) that the public interest did not extend to seeing the exact language used in unpublished letters, even when only lightly quoted rather than reproduced in full—especially given that this case concerned celebrated author J.D. Salinger offering scathing commentary about Charley Chaplin, Oona O'Neil, and other figures of intense news value (as opposed to the entirely anonymous character of everything about the foregoing police newsletter). Yet that latter case denied the fair use defence that the former one vindicated. The difference, sub silentio, seems to be the overwhelming value of the desideratum of combating racism wherever it exists.

Another example unfolded when a radio talk-show host made veiled anti-Semitic comments. *The Boston Globe* ran a story about the contretemps. Not content merely to characterize what was said on the air, the newspaper went further and used taped excerpts to bolster its reportage. The defendant in that case likewise prevailed under the fair use doctrine (*National Association of Government Employees/International Bhd. of Police Officers* v. *BUCI TV, Inc.* 2000). Correlatively, another court validated the Council on American-Islamic Relations's copying of a conservative talk-show host's anti-Islamic statements by posting on its website a four-minute audio segment from the radio programme (*Savage v. Council on American-Islamic Relations, Inc.* 2008). By contrast, when the purpose of copying was not to combat racial animus but merely to expose the liberal bias of the mainstream press by reproducing articles that appeared there, the fair use defence failed (*Los Angeles Times, Inc.* v. *Free Republic* 2000). Also worth mentioning here is the ruling in favour of the TV show *South Park*, when it substituted new lyrics for the famous Disney song 'When You Wish upon a Star' to become 'I Need a Jew'. The court derived support for its fair use ruling from the usage's dig at Walt Disney personally, given a 'widespread belief' that he was anti-Semitic (*Bourne Co.* v. *Twentieth Century Fox Film Corp.* 2009).

Of course, the three categories just confronted are not themselves exhaustive. Commentators have posited a
p. 142 variety of circumstances that ↳ effectively prevail, on a consistent basis, as fair use. Included here are perversion of copyright law as a pretext to suppress free speech on issues of public importance, quotation by a documentarian or by a historical work of snippets from prior works in order to advance a thematic point or to set a historical context, and the development of technologies designed to facilitate personal fair uses, as well as search-engine copying for the purpose of indexing or otherwise making information about protected works more publicly accessible.

Based on the foregoing, it would seem that, as a matter of legal realism, the US copyright law embodies the following non-exclusive categories of ersatz 'fair dealing':

1. copying for purposes of judicial proceedings, except with respect to material commissioned for the purpose of that proceeding;
2. copying for purposes of comparative advertising; and
3. copying of expressive materials on account of racist components reflected therein.

To summarize, in theory and when viewed in the abstract, 'fair use' and 'fair dealing' are routinely described as two competing approaches to the delineation of limitations and exceptions in copyright law. Legal systems are thus seen as needing to make a choice between them and, in the process, having to trade off competing structural considerations. While this may be true as a matter of principle, a comparison of the Indian and US approaches reveals that the story is far more nuanced than what the simple dichotomy suggests. In practice, and as the system develops, the flexibility and open-endedness of fair use can indeed produce recurring patterns, while, conversely, the rigidity of fair dealing might indeed also produce new lawmaking from courts. The set of background principles motivating legal analysis and the institutional dynamics between courts and other legal institutions in the system seem to play an equal (if not more important) role in determining the direction that each approach takes. Consequently, one needs perhaps to

be a bit more circumspect before predicting where either approach will lead a copyright system and its approach to innovation.

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Notes

1 *Columbia Broadcasting System, Inc.* v. *Loew's Inc.* (1958); *Williams & Wilkins Co.* v. *United States* (1975).

2 See Gowers (2006); Griffiths (2002).

3 Nevertheless, a continuation of this trend is to be seen in the even more recent decision of the Delhi High Court (Division Bench) in the Delhi University Photocopying case (*The Chancellor, Masters & Scholars of the University of Oxford* v. *Rameshwari Photocopy Services* 2017). The case involved an action for copyright infringement brought by several academic publishers against a photocopying 136service at University of Delhi, which was entrusted with the preparation of course packs, put together by professors at the university. In finding the defendant's actions to be non-infringing, the court concluded that 'fair use' was an implicit part of the Indian copyright landscape such that unless the doctrine was shown to have been excluded by legislative intent, it ought to be 'read into the statute'. It then relied on the idea of fairness in use to conclude that the educational purpose being served by the course packs rendered the use a fair use. During its analysis, the court even acknowledged that its approach to fair use was distinctive (and more expansive) than what had been seen in the jurisprudence of American courts.