
FAIR USE AND DIGITAL LIBRARIES: A LEGAL FRAMEWORK FOR ACCESS AND PRESERVATION: COMPARATIVE ANALYSIS ACROSS JURISDICTIONS

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ABSTRACT

Digital libraries constitute essential mechanisms for the preservation of cultural heritage and the facilitation of equitable access to knowledge within the contemporary digital landscape. Notwithstanding these functions, copyright regimes impose substantial constraints upon digitization and dissemination activities. The present analysis undertakes a comparative examination of fair dealing and fair use provisions across multiple jurisdictions, with emphasis upon their applicability to digital libraries in respect of access and preservation. Statutory texts, judicial precedents, and doctrinal variances are scrutinized, revealing divergent approaches to balancing proprietary interests with public imperatives. Reforms may prove necessary in certain regimes to reconcile copyright enforcement with exigencies of digital archival practices.

Introduction

Digital libraries function as repositories for the safeguarding of vulnerable works and the promotion of universal access to informational resources.¹ These institutions facilitate the archiving of scarce manuscripts, obsolete publications, and multimedia materials, thereby advancing scholarly inquiry, pedagogical objectives, and cultural interchange. Copyright protections, however, delimit the scope of permissible digitization. Exceptions such as fair use and fair dealing authorize restricted utilization of protected materials absent authorization from rights holders. This examination contrasts fair dealing and fair use doctrines across jurisdictions, including Section 52 of the Indian Copyright Act, 1957; Section 107 of the US Copyright Act, 1976; Sections 29-30 of the UK Copyright, Designs and Patents Act 1988; Section 29 of the Canadian Copyright Act; and Article 5 of the EU InfoSoc Directive 2001/29/EC, as amended by the Copyright in the Digital Single Market Directive 2019/790. Emphasis is placed upon access modalities, including searchable indices and restricted viewing, as well as preservation measures, such as digitization for archival integrity. Statutory provisions, adjudicative interpretations, and emergent precedents inform the conclusion that flexible frameworks more readily accommodate technological advancements, whereas prescriptive enumerations necessitate legislative augmentation to address contemporary exigencies.²

Fair Dealing under Section 52 of the Indian Copyright Act

The Indian copyright framework, derived from common law traditions, incorporates the doctrine of fair dealing in lieu of a broader fair use exception. Section 52 delineates enumerated acts exempt from infringement liability, establishing a finite catalogue of defences.³ Subsection (1)(a) sanctions fair dealing with works, excluding computer programs, for purposes comprising

- (i) private or personal utilization, inclusive of research;
- (ii) criticism or review; or

¹ Kenneth D. Crews, *Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions* 1-10 (4th ed. 2020)

² Shyamkrishna Balganesha & David Nimmer, *Fair Use and Fair Dealing: Two Approaches to Limitations and Exceptions in Copyright Law, in India as a Pioneer of Innovation* 115, 115-144 (Harbir Singh et al. eds., 2017).

³ Copyright Act, 1957, No. 14, § 52 (India).

- (iii) reportage of current events.⁴

Determination of fairness entails evaluation of elements such as the quantum appropriated, the objective pursued, and the prospective market detriment.⁵

Pertinent to digital libraries, subsection (1)(o) authorizes non-commercial public libraries to reproduce up to three copies of a book, encompassing digital formats, for archival or substitution purposes where the original proves unavailable commercially within India.⁶ This provision sustains preservation efforts, albeit within circumscribed bounds, precluding large-scale digitization or public dissemination. Subsection (1)(n) permits electronic storage of works by non-commercial libraries for internal reference or where commercial exploitation is infeasible.⁷

Adjudicative expansions of fair dealing have occurred. In *The Chancellor, Masters & Scholars of the University of Oxford v. Rameshwari Photocopy Services*, the Delhi High Court determined that reproduction of course packs for instructional purposes constituted fair dealing under subsection (1)(a)(i), aligning towards public imperatives in educational access.⁸

In *Syndicate of the Press of the University of Cambridge v. B.D. Bhandari & Anr*⁹, the Delhi High Court recognized that the creation of guidebooks based on copyrighted texts as transformative fair dealing, particularly in educational circumstances. In *Super Cassettes Industries Ltd. v. Myspace Inc*¹⁰, the court examined intermediary liability for user-uploaded content in digital platforms, whereby the court applied fair dealing principles to determine non-infringement where transformative uses or limited excerpts for criticism were involved. Tensions are still high in *Elsevier Ltd. & Ors. v. Alexandra Elbakyan & Ors*¹¹, where the court is addressing infringement claims against digital repositories involving platforms like Sci-Hub providing unauthorized access to academic works. The odds are stacked up against these self-confessed piracy repositories and there is a significant chance that the Delhi High Court might

⁴ Id. § 52(1)(a).

⁵ Pushpanjali Sood, Fair Dealing in India: An Analysis vis-à-vis Fair Use in the United States, 28 J. Intell. Prop. Rts. 560, 562 (2024).

⁶ Copyright Act, 1957, § 52(1)(o).

⁷ Id. § 52(1)(n).

⁸ *The Chancellor, Masters & Scholars of the Univ. of Oxford v. Rameshwari Photocopy Servs.*, 2016 SCC OnLine Del 5128.

⁹ (2011) 185 DLT 346 (Del. HC)

¹⁰ 2016 SCC OnLine Del 6382

¹¹ CS(OS) 196/2017 (Del. HC 2020)

issue a dynamic injunction against them. From a legal standpoint, with Sci-Hub being a self-proclaimed piracy website, it may not be right to say that it should be permitted to function. This case would set a precedent and provide impetus for other piracy websites to provide unauthorized and illegal access to copyrighted material, and may clear the tensions between fair dealing for research and mass unauthorized dissemination.

Judicial authority remains limited in the digital library context. Operations of the National Digital Library of India adhere to fair dealing constraints, permitting excerpts for reportage or inquiry, though comprehensive digital lending leads to dispute.¹² Amidst exigencies such as the COVID-19 pandemic, tribunals have exhibited latitude toward online pedagogy, yet archival activities exceeding statutory delineations incur infringement risk.¹³ The restrictive enumeration under Section 52 may inhibit innovative digital applications, compelling reliance upon licensing arrangements for broader access.¹⁴

Fair Use under Section 107 of the US Copyright Act

Conversely, Section 107 establishes fair use as a non-exhaustive exception, authorizing utilization of protected works for objectives including criticism, commentary, news reportage, instruction, scholarship, or research.¹⁵ Fairness assessment invokes four statutory criteria:

- (1) the purpose and character of the utilization, encompassing transformative or commercial attributes;
- (2) the nature of the protected work;
- (3) the quantum and substantiality of the portion appropriated; and
- (4) the impact upon the prospective market.¹⁶

¹² Taysir Awad, Universalizing Copyright Fair Use: To Copy, or Not to Copy? 30 J. Intell. Prop. L. 1, 15-20 (2022).

¹³ Michael P. Goodyear, Culture and Fair Use, 32 Fordham Intell. Prop. Media & Ent. L.J. 334, 350-355 (2022).

¹⁴ Giuseppina D'Agostino, Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use, 53 McGill L.J. 309, 320-324 (2008).

¹⁵ 17 U.S.C. § 107 (2024).

¹⁶ *Id.*

This framework affords adaptability to novel contexts, particularly digital innovations.¹⁷

Fair use has substantially advantaged digital libraries. In *Authors Guild v. Google, Inc.*, the Second Circuit affirmed that digitization of extensive book corpora for searchable repositories qualified as transformative fair use, furnishing metadata and excerpts without supplanting original markets.¹⁸ Analogously, *Authors Guild v. HathiTrust* upheld scanning for preservation, full-text searchability, and accessibility for visually impaired individuals as fair use, prioritizing thereof societal advantages in research efficacy and inclusivity.¹⁹

Affirming fair use for image search engine thumbnails in *Kelly v. Arriba Soft Corp*²⁰ the court supported digital libraries use of metadata and previews for access without substituting originals.

Still boundaries persist. In *Hachette Book Group, Inc. v. Internet Archive*, the Second Circuit determined that "controlled digital lending"—scanning and circulating digital replicas without authorization—did not constitute fair use, given the economic harm to electronic book sectors and absence of transformative character.²¹ This adjudication delineates that fair use endorses preservation and access yet vitiates indiscriminate digital duplication.²² Recent interpretations extend fair use to emergent technologies, encouraging its capacity to evolve with digital paradigms.²³

Fair Dealing under Sections 29-30 of the UK Copyright, Designs and Patents Act 1988

The UK regime, foundational to many common law systems, prescribes fair dealing within enumerated purposes under the Copyright, Designs and Patents Act 1988. Section 29 permits fair dealing for “research” or “private study”, while Section 30 extends to criticism, review, or news reporting.²⁴ Fairness evaluation considers factors akin to those in other jurisdictions,

¹⁷ Patricia Aufderheide & Peter Jaszi, Reclaiming Fair Use: How to Put Balance Back in Copyright 50-60 (2d ed. 2018).

¹⁸ *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

¹⁹ *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

²⁰ 336 F.3d 811 (9th Cir. 2003)

²¹ *Hachette Book Grp., Inc. v. Internet Archive*, 83 F.4th 124 (2d Cir. 2024).

²² Taysir Awad, Generative AI's Copyright Enigma: A Comparative Study of Fair Use and Fair Dealing, 14 IP Theory 27, 40-50 (2025).

²³ David Nimmer, Copyright and the Fall Line, 31 Cardozo Arts & Ent. L.J. 303, 315-320 (2013).

²⁴ Copyright, Designs and Patents Act 1988, c. 48, §§ 29-30 (UK).

including proportionality and attribution, though confined to statutory categories.²⁵

In *Public Relations Consultants Association Ltd v. Newspaper Licensing Agency Ltd*²⁶ The Supreme Court addressed browsing and caching of news articles, interpreting fair dealing narrowly for transient copies but influencing digital access in libraries under research exceptions. In *Hubbard v. Vosper*²⁷ the court of Appeal upheld fair dealing for criticism and review, applicable to digital excerpts in library archives for scholarly purposes. The Court of Appeal in *Ashdown v. Telegraph Group Ltd*²⁸ considered fair dealing for news reporting, relevant to digital libraries' use of copyrighted material in current events databases, balancing public interest.

For libraries, Section 40B authorizes communication of works via dedicated terminals on premises, facilitating on-site access without broader dissemination.²⁹ Section 42 enables preservation copies by cultural institutions, allowing replacement of damaged or lost items in permanent collections.³⁰ Amendments in 2014 expanded exceptions to encompass data mining for non-commercial research, yet mass digitization remains constrained absent explicit provision.³¹ Judicial scrutiny is infrequent in digital contexts; however, the regime's rigidity has prompted calls for reform to address online archival needs.³² The UK Intellectual Property Office guidance supplement's that fair dealing does not encompass commercial exploitation, thereby limiting digital library initiatives to non-profit endeavours.³³

Fair Dealing under Section 29 of the Canadian Copyright Act

Canada's fair dealing provision, articulated in Section 29, encompasses purposes such as research, private study, education, parody, satire, criticism, review, and news reporting.³⁴

²⁵ Tanya Aplin & Lionel Bently, Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works 100-110 (2020).

²⁶ [2013] UKSC 18

²⁷ [1972] 2 QB 84

²⁸ [2001] EWCA Civ 1142

²⁹ Copyright, Designs and Patents Act 1988, § 40B.

³⁰ Id. § 42.

³¹ Eleonora Rosati, Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790 150-160 (2021).

³² Ronan Deazley & Robert Sullivan, Copyright and Cultural Institutions: Guidelines for Digitisation 45-50 (2015).

³³ UK Intellectual Property Office, Exceptions to Copyright: Libraries, Archives and Museums (2014).

³⁴ Copyright Act, R.S.C. 1985, c. C-42, § 29 (Can.).

Supreme Court jurisprudence has interpreted fair dealing expansively, treating it as a user right rather than mere exception.³⁵

In *CCH Canadian Ltd. v. Law Society of Upper Canada*³⁶, A group of publishers sued the Law Society of Upper Canada for copyright infringement for providing photocopy services to researchers. The Court looked at what is considered the meaning of "original work". Chief Justice McLachlin first remarked that copyright does not protect ideas, but rather their expression. In comparison with the similar US Supreme Court case of *Feist Publications Inc. v. Rural Telephone Service*, McLachlin rejected Justice O'Connor's "minimal degree of creativity" test but agreed with her assessment of the "sweat of the brow" approach and found it too low a requirement.³⁷

Instead, McLachlin took the middle ground by requiring "that an original work be the product of an exercise of skill and judgment" where "skill" is "the use of one's knowledge, developed aptitude or practised ability in producing the work" and "judgment" is "the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work". As well, "[t]he exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise." Importantly, it is required that the work "must be more than a mere copy of another work."³⁸

In concluding that all eleven works in the case were protected by copyright, she noted that the creation of headnotes, summaries, and topical indices involved sufficient exercise of skill and judgment so as to render them "original" works. However, she also noted that the judgments themselves were not copyrightable, nor were the typographical corrections done by the editors sufficient to attract copyright protection. The Court established a two-step test: qualification under an enumerated purpose, followed by fairness assessment via six factors, including purpose, character, amount, alternatives, nature, and effect.³⁹ This approach aligns Canadian

³⁵ Carys J. Craig, Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law 200-210 (2011).

³⁶ [2004] 1 SCR 339 [*CCH*]

³⁷ *Supra* at para 16

³⁸ Cameron, Donald M. (2015). *Canadian Copyright/Industrial Designs Benchbook*. Toronto, Ontario: Carswell. p. 51.

³⁹ *CCH Canadian Ltd. v. Law Soc'y of Upper Can.*, [2004] 1 S.C.R. 339 (Can.).

doctrine closer to US fair use in flexibility.⁴⁰ In *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*⁴¹ The Supreme Court expanded fair dealing to include classroom photocopying, supporting digital reproductions in educational libraries for student access.

Digital libraries benefit from these interpretations. The 2012 amendments incorporated education as a purpose, enabling broader pedagogical digitization.⁴² In *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, the Federal Court of Appeal affirmed fair dealing for educational copying, though market impact remains pivotal.⁴³ A 2024 Federal Court ruling in *Blacklock's Reporter v. Canada* clarified that technological protection measures cannot override fair dealing, enhancing digital access potentials.⁴⁴ Canadian libraries, such as those under the Canadian Association of Research Libraries, leverage fair dealing for preservation and limited online lending, subject to fairness evaluations.⁴⁵

Exceptions under Article 5 of the EU InfoSoc Directive

The European Union harmonizes copyright exceptions through Directive 2001/29/EC (InfoSoc Directive), Article 5 of which enumerates optional limitations, mandatory only for transient reproductions.⁴⁶ Article 5(2)(c) permits specific reproductions by publicly accessible libraries for non-commercial purposes, while Article 5(3)(n) authorizes on-premises communication via dedicated terminals for research.⁴⁷ The Copyright in the Digital Single Market Directive (Directive: 2019/790) augments these with Article 6 for cultural heritage preservation and Article 5 for digital cross-border teaching.⁴⁸ Court of Justice of the European Union precedents enforce strict interpretation; in *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*, e-lending was equated to physical lending under exhaustion principles, yet confined to one-copy-

⁴⁰ Ariel Katz, Fair Use 2.0: The Rebirth of Fair Dealing in Canada, in *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* 93, 93-120 (Michael Geist ed., 2013).

⁴¹ 2012 SCC 37

⁴² Copyright Modernization Act, S.C. 2012, c. 20 (Can.).

⁴³ *York Univ. v. Canadian Copyright Licensing Agency (Access Copyright)*, 2020 FCA 77 (Can.).

⁴⁴ *Blacklock's Reporter v. Canada* (Attorney General), 2024 FC 829 (Can.).

⁴⁵ Canadian Association of Research Libraries, *Fair Dealing: Myths and Facts* (2017).

⁴⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, art. 5.

⁴⁷ *Id.*

⁴⁸ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market, 2019 O.J. (L 130) 92, arts. 5-6.

one-user models.⁴⁹ In *Technische Universität Darmstadt v. Eugen Ulmer KG*⁵⁰ The CJEU permitted libraries to digitize books for on-site electronic reading posts without permission, under Article 5(3)(n), supporting digital access for research. Fragmentation across Member States persists, as exceptions are not uniformly implemented, impeding pan-European digital libraries.⁵¹ *Infopaq International A/S v. Danske Dagblades Forening*⁵² the court went on Defining reproduction rights and transient copies, impacting library data mining and caching under Article 5(1), requiring lawful access for exceptions. *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*⁵³, allowed exceptions for reporting current events under Article 5(3)(c), relevant to digital libraries archiving news materials without market harm.

The regime's exhaustive list precludes judicial innovation akin to fair use, aiming for harmonization over flexibility.⁵⁴

Comparative Analysis

Doctrinal divergence manifests in scope and adaptability: exhaustive enumerations in India, the UK, and the EU contrast with illustrative frameworks in the US and Canada.⁵⁵ India's Section 52 and the UK's Sections 29-30 mandate categorical conformity, inhibiting transformative digital uses such as mass scanning, whereas US Section 107's four-factor test accommodates innovations like searchable databases.⁵⁶ Canada's hybrid model, post-CCH, bridges this gap, permitting educational digitization with fairness scrutiny.⁵⁷

EU Article 5's optional exceptions yield inconsistency, though recent directives enhance preservation, yet fall short of US flexibility for cross-border access.⁵⁸ Exempli gratia, Google Books' transformative application would likely qualify under US and potentially Canadian law

⁴⁹ Case C-174/15, *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*, ECLI:EU:C:2016:856.

⁵⁰ Case C-117/13, ECLI:EU:C:2014:2196 (CJEU 2014)

⁵¹ Christophe Geiger et al., *The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society* 50-60 (2021).

⁵² Case C-5/08, ECLI:EU:C:2009:465 (CJEU 2009)

⁵³ Case C-469/17, ECLI:EU:C:2019:623 (CJEU 2019)

⁵⁴ Martin Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* 120-130 (2004).

⁵⁵ Nikhil Viswam Menon et al., *Unravelling the Differences Between Fair Use and Fair Dealing: Limitations to Copyright*, 2 *Indian J. Integrated Rsch. L.* 1, 5-10 (2023).

⁵⁶ Balganeshe & Nimmer, *supra* note 2, at 130-135.

⁵⁷ D'Agostino, *supra* note 11, at 330-335.

⁵⁸ Vicky Breemen, *Digital Libraries Under EU Copyright Law*, 8 *Eur. Papers* 123, 130-140 (2023).

but exceed Indian, UK, or EU confines without licensing.⁵⁹

Preservation limits vary: India's three-copy cap and the UK's replacement provisions restrict scale, unlike US allowances for expansive archiving or EU's heritage-focused reproductions.⁶⁰ Access provisions favour pedagogical imperatives in Canada and the EU's teaching exception, yet market harm assessments in Hachette constrain.

Conclusion

Fair use and fair dealing doctrines serve indispensable roles in permitting digital libraries to execute archival and access functions without vitiating proprietary entitlements. Adaptable contours in US Section 107 and Canadian Section 29 demonstrate efficacy in integrating digital modalities, as illustrated in precedents such as *Authors Guild v. Google and CCH*, whereas prescriptive frameworks in India, the UK, and the EU remain encumbered by specificity.⁶¹ Augmentation of enumerated provisions, potentially incorporating multifactorial evaluations or transformative exceptions, warrants consideration across jurisdictions. Equilibrium between intellectual property safeguards and informational dissemination imperatives remains paramount in leveraging technological capacities for societal benefit.

⁵⁹ Sood, *supra* note 5, at 565.

⁶⁰ Awad, *supra* note 9, at 25.

⁶¹ Aufderheide & Jaszi, *supra* note 14, at 100-110.