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Contemporary Analysis of The Transformativeness Criterion in The age of Artificial Intelligence Re-Imaginative Tools in The Indian Creative Industry

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ABSTRACT

The law is an endeavour that is dedicated to the welfare of the people of a country. It is of pertinence that the law stay in parallel with the ways of the current times. When the law is obsolete or outdated, the people suffer. In this World, there are artists of natural talent, and there are artists with state-of-the-art avant-garde technology. The former is the definitive lifeblood of the Indian creative industry. In the sphere of copyright law, the protection of their rights is of utmost importance for nurturing the growth of the creative industry. The transformative criteria, a legal conception of American Copyright Law has been the cornerstone for determining the fair use of copyright not just in the United States, but for various other Commonwealth Nations such as India as well. In the Indian context, the transformative criteria for establishing fair use have been a product of judicial activism by the Indian Courts through precedent law. This research paper revolves around this contemplation in the premise of the contemporary world of "short cut" technology and further, aims to determine whether the transformative criteria is still valid, and whether there may exist more decisive criterion in establishing whether a certain use of copyright is moral or not.

Keywords: *Copyright, Ideas, Transformative, Dichotomy, Artistic Works, Expression, Derivative Works, Creativity and Inventiveness.*

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1. INTRODUCTION

In recent times, the increasing tide of the Artificial Age has been growing strong. What could be a defining prospect of the 20s decade, are the rise of AI-powered re-imaginative devices which all have had, a transcending effect on various industries in the Globe. From the viewpoint of the growth of a civilization, the use of advanced technology in development of public amenities for the sake of public welfare is a commendable endeavour. However, the very same technological capitalization in the artistic works industry has an antithetical corollary.

The *sine qua non* requirement of Indian Copyright Law is originality of expression[1]. This prerequisite stems from various instinctive human virtues such as creativity, innovation and inventiveness[2]. This requirement applies not only for the claim of copyright but also for the use of a copyrighted work[3]. When referring to the originality of expression for a derivative work, this is essentially a reference to the "transformative nature" of the derivative work as compared to the original copy[4]. In the Indian context, the extent of the modified nature of the derivative work, determines whether the use of copyrighted material is legitimate or not, as famously held by the Indian Apex Court in the Narendra Publishing House case in 2008.

In recent times however, the transformative criteria for establishing lawful use of copyright by way of the Doctrine of Fair Use has become highly contentious, especially within the industry of artistic works[5]. With the rise of AI-powered re-imaginative devices a deliberation of Indian precedent law arises as to whether the copyright touchstone of "transformativeness" is still pragmatically satisfactory or, is it merely a matter of legal fiction.

2. CRITICIZING THE CONTOURS OF THE TRANSFORMATIVE CRITERIA IN DOCTRINE OF FAIR USE IN ARTISTIC WORKS

It is a prominent conception in copyright law, that the copyright protection becomes applicable when the creative expression of a novel idea is laid forth in a tangible medium of

1 Copyright Act, 1957 (Act 14 of 1957), s. 13.

2 *Eastern Book Company. v. D.B. Modak & Anr.,* (2007) SCC 1513.

3 *Chancellor Masters & Scholars of University of Oxford v. Narendra Publishing House,* (2008) SCC Del 1058.

4 *Ibid.*

5 Copyright Act, 1957 (Act 14 of 1957), s. 2 (c).

expression[6]. When it comes to artistic works[7], not only do the works unquestionably come in a tangible medium of expression, but they also come in a physical form of expression. As such, their features are regarded as being more definitive. The categorical criterion by which Indian copyright law grants the exclusivity of use is "originality"[8]. In contrast, the criterion for a derivate work is "transformativeness", being that transformativeness is a product of "original expression[9]" possess a substantial minimal modicum of creativity to justify its reuse[10].

The transformative criteria has proven to have been the prime cornerstone of the Doctrine of Fair Use. In India, the Doctrine of Fair use was prominently first established in the landmark Delhi High Court case of *Chancellor Masters & Scholars of Oxford v. Narendera Publishing House & Ors.,* 2008[11]. This case established the arrangement of the Doctrine of Fair Use in the instance where, the derivative work exhaustively altered all aspects of the original work. Comprehensively, when analyzing the various Indian precedents that have utilized the "transformative" criteria, 4 dimensions are known as part of this criterion for evaluating the fair use of a derivative work[12], namely - (1) quantum of replication, (2) qualitative value addition, (3) intention of derivative work and (4) market effect on copyright holder. While the 4 facets have been recognized as the benchmarks for transformativeness in Indian Courts, some of these factors are in part (or in full) destitute of realness & legitimacy in context to the contemporary times of advanced technological growth and overutilization.

2.1 Fallacy in considering Quantum of Replication to determine applicability of Doctrine of Fair Use

The *Chancellor Masters & Scholars of Oxford v. Narendera Publishing House & Ors.,* 2008[13] case mentioned above is a prominent precedent for the ratio establishing that, "unique re-arrangement, re-sequencing and useful additions" are a facet of a legitimate transformativeness that justifies applicability of Doctrine of Fair Use. It is significant to note that the facets mentioned above to justify transformativeness is a measure that is

6 Copyright Act, 1957 (Act 14 of 1957), s. 14 (a) (i).

7 *Supra* note 5 at 2.

8 Copyright Act, 1957 (Act 14 of 1957), s. 13 (1) (a).

9 Abrams & Howard B. "Originality and creativity in copyright law." Law & Contemp. Probs. 55 (1992): 3.

10 *Supra* note 2 at 2.

11 *Supra* note 3 at 2.

12 *Harper & Row v. Nation Enterprises,* 471 U.S. 539 [1985].

13 *Supra* note 3 at 2.

entirely quantitative in nature. The ratio of this landmark Delhi High Court case, considers the tangible quantum of alteration with regard to the original work.

The fallacy with this criterion is that, it disregards the modicum of creativity test as envisioned by the Supreme Court of India in *Eastern Book Company & Ors. v. D.B. Modak & Anr.* [2007][14]. In lieu of the Narendra Publishing House case [2008] judgement resting entirely on "re-arrangement of substance" as per a quantitative transformativeness analysis, it is argued that the precedent set by the Narendra Publishing House case [2008] is lacking, especially with the modern age of AI-powered re-sequencing devices such as QuillBot[15]. When forming a nexus between the Narendra Publishing House case [2008] & the EBC Reader case [2007], we understand how despite the EBC Reader case [2007] coming a year prior to the Narendra Publishing House case [2008], the latter Judgement from the Delhi High Court's case has been made *per incuriam* to the ratio of the Apex Court in the EBC Reader case.

When considering a quantitative test to determine whether or not the doctrine of fair use is applicable, the analogy of the Sweat & Brow Test can be construed to the quantitative test in lieu of the former, priority of the "effort and labour" invested by the author. The quantitative test analyzes what are the tangible extracts of works that have been imitated by the derivative work. In the landmark case of *Civic Chandran v. Ammini Amma* [1996][16], the Hon'ble Kerala High Court observed that "to copy long extracts and add short comments to it do qualify as fair use but rather, to copy short extracts and add long comments to it, is what constitutes as a fair use of copyright". The High Court's consideration relating to "portion of imitation", is reminiscent of the quantitative impersonation. In the case of *E.M. Forster v. A.N. Parasuraman* [1964][17], the Hon'ble Madras High Court's findings included the criterion of "verbatim-nature" of derivative work, when contemplating on the applicability of the Doctrine of Fair Use.

These conclusions drawn by the Hon'ble Kerala & Madras High Court are on the lines of the quantitative analysis. The main flaw with the quantitative analysis is that it analyzes the physical extent to which the work has been altered. In truth, this alteration is a product of the "effort and mind" exerted by an artist to creative a transformed version of the original work for which, the law used to reward with copyright protection as per the Sweat & Brow Test[18]. The Sweat & Brow Test was overruled by the Test of Modicum

14 *Supra* note 2 at 2.

15 Quillbot, QuillBotAI.com.

16 [1996] 16 PTC 329.

17 AIR 1964 MAD 331.

18 *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber,* [1995] 61 DLT 6.

of Creativity in the EBC Reader case [2007]. The modicum of creativity test is based on a qualitative analysis of the derivative work.

2.2 Analyzing the Qualitative Test for determining applicability of Doctrine of Fair Use

A quintessential requirement under the transformative criteria is the "value-addition" aspect i.e., how much more commercial or qualitative enhancement has the derivative work generated with respect to the original work. This test is in line with the Modicum of Creativity Test that replaced the Sweat & Brow Test as established by the Apex Court in *Eastern Book Company & Ors. v. D.B. Modak & Anr.* 2007 case. The Modicum of Creativity test comparatively analyzes the novel essence of the derivative work in pretext to the original work. It analyzes the incidence of the value added by the derivative work to the original.

It is pertinent to note, that although the Narendra Publishing House case [2008] does make reference to "useful additions" as a factor for determining applicability of the Doctrine of Fair Use, when comprehending the factual matrix of this case it is inferred that this is a mere reference to literal imitations of other original works. A mere compilation of multiple original works do not qualify as a transformed work of art[19].

In a pragmatic sense, this test transcends the limiting legal fiction of the quantitative test of transformativeness. The qualitative essence of an artistic work is rhetoric to the inventiveness and creative disposition of the artist. Creativity & Inventiveness are the focal points of a creative industry[20]. These qualities can only arise from the virtue of human emotional intelligence[21]. In this light, it can be arguably stated that within the ground premise of the artistic industry, the qualitative analysis of transformativeness is the most accurate test for substantiality of transformativeness of a derivative work, to prove applicability of the Doctrine of Fair Use.

2.3 Appreciation of other criterion for determining applicability of the Doctrine of Fair Use

In American copyright jurisprudence, section 107 of the American Copyright Act, 1976[22] considers 4 factors in determining the applicability of the Fair Use Doctrine

19 *Feist Publications Inc. v. Rural Telephones Service Co.,* 499 U.S. 340 [1991].

20 Nikita Miskin, Link between Emotional Intelligence and Creativity, Anoma Tech Inc, Medium, [2023].

21 *Ibid.*

22 Copyright Act, 1976 (Act 17 of 1976), U.S.C. §§ 107.

namely, (1) purpose & character of reuse, (2) nature of copyrighted work, (3) amount & substantiality of portion reused and (4) effect on potential market. Most of the Indian judgements on the Doctrine of Fair Use, have circuitously referred to the significance of "amount and substantiality of reuse" in determining a fair use whereas, all 1st and 4th factor have been comprehensively referred to in the landmark Kerala High Court case of *Civic Chandran v. Ammini Amma* [1996][23].

2.4 Effect on Potential Market of Copyright-Holder as a Fair Use Criterion

In the Kerala High Court case of *Civic Chandran v. Ammini Amma* [1996][24], reference was made to the landmark Common law precedent of *Hubbard v. Vosper* [1972][25] which noted the "potential competition" meted out to the plaintiff as a result of the use of his copyright as a factor to decipher the applicability of the fair use defence. The Hon'ble Kerala High Court made reference to the revered author Copinger who stated that "in considering whether a dealing with a particular work was fair, it would have to be considered whether any competition was likely to exist between the 2 works"[26].

2 .5 Purpose & Character of Reuse by Derivative Work as a Fair Use Criterion

The *Civic Chandran v. Ammini Amma* [1996] does significantly discuss on the purpose and character of reuse by a derivative work as a fair use criterion. However, the most prominent Indian case on this frontier is the landmark Delhi High Court case of *Chancellors, Masters & Scholars of University of Oxford & Ors. v. Rameshwari Photocopy Services & Ors.*[27].

This Indian precedent highlighted the significance of the "intention & purpose" of the derivative work (in context to the original work) so as to decipher a supposed fair use of copyright. This case revolved the provisions Sec. 52 (1) (h) & (i) of the Copyright Act, 1957[28&29]. While these two criterions of fair use determination have proven to be prominent ones within the Indian copyright framework they are by its very definition, brought within the purview of the transformative substantiality contention, either quantitatively or qualitatively.

23 *Supra* note 18 at 5.
24 *Ibid.*
25 [1972] 2 Q.B. 84.
26 *Supra* note 18 at 5.
27 [2016] Del 6229.
28 Copyright Act, 1957 (Act 14 of 1957), s. 52 (1) (h).
29 Copyright Act, 1957 (Act 14 of 1957), Sec. 52 (1) (i).

3. PROSPECTIVE ANALYSIS OF VIRTUES & SHORTCOMINGS OF CAPITALIZATION OF ARTIFICIAL INTELLIGENCES IN THE ARTISTIC WORKS INDUSTRY: CONTEXT TO TRANSFORMATIVE FAIR USE

The contemporary age of technological and artificial intelligence advancement, has impacted various fields and industries in the World. The artistic & creative industries are such archetypes. The transformative criteria, which has been the cornerstone for determining applicability of the Doctrine of Fair Use, is to be taken for granted in the modern era. The AI's capacity to entirely transform the form of expression of the original work, is in lieu of its technological aptitude to create varying patterns and correlations using its plethora of ingested input data[30]. These factors aid its capacity to create unique, distinct and original works of art.

3.1 Enabling Ramifications of Transformative Criteria for Artificial Intelligences

It is pertinent to note that the virtue of "originality", is a product of the artistic quality of creativity. The significance of creativity in copyrighted works was recognized in various cases, most prominently in the landmark *Eastern Book Company & Ors. v. D.B. Modak & Anr.* 2007[31]. In context to the current age of artificial intelligence, it is significantly placed on regard as to the adversity of misuse of the Doctrine of Fair Use by non-artistic persons. The modicum of "creativity" fulfilled by AIs in their output of original artistic works, is not as a result of some actual creative disposition but rather, it is a product of the AI's technological aptitude that is powered by meticulous & proficient software engineering[32]. This is in contrary to the soul meaning of 'creativity', as envisioned by Indian Copyright Law[33].

3.2 Incongruous Bearing of Artificial Intelligence in Creative Industry

It is argued that AIs do not possess the "humane" visionary, imaginative, inventive and creative skills required to transform the authentic work of natural artists. On a creative level, computers and artificial intelligences ultimately, are unintelligible and dense in

30 *Supra* note 21 at 6.

31 *Supra* note 2 at 2.

32 David Nield, "How ChatGPT and Other LLMs Work—And Where They Could Go Next", *Wired,* Apr. 30, 2023, *available at:* https://www.wired.com/story/how-chatgpt-works-large-language-model/.(last visited on May 23, 2024)

33 *Supra* note 2 at 2.

character[34]. Often referred to in the AI field as "stochastic parrots", AI persons & tools act as entities who rearrange and display already-existing data in such a way it fabricates a false sense of originality that arises from a deluded perception of creativity[35]. In truth, this capacity to create seemingly original content is not in lieu some creative disposition but rather, the AI does this through mathematical equations, substitutable variables and probabilities of incidence[36]. These are based on the previously ingested literary expressions. The AI software predicts the most similar but distinctive word to come next in a sentence so as to create distinguishable literary content to that of original input data[37].

The conceptual inference to be made is that the lack of rhetoric and passion in computer programmes towards their users is precisely what makes human authorship so contrasting to that of artificial authorship[38]. Computers have no foundation whatsoever for determining the choices that go into natural utterances when the user or programmer removes the richness of information, viewpoint, and intention from their speech[39].

4. THE WAY FORWARD: CONSTRICTING THE TRANSFORMATIVE CRITERIA TO THE QUALITATIVE SCALE

The transformativeness factor, has been the pinnacle of infringement-evaluation in Indian precedent law. As discussed above, the substantiality of the modicum of transformativeness has 2 dimensions to it *namely,* quantitative test & qualitative test. In the modern age of Artificial Intelligences, the veracity of this criterion for applicability of fair use has been put to austere test. In this light it is argued that the qualitative test, as envisioned by the *Eastern Book Company & Ors. v. D.B. Modak & Anr.,* [2007][40] ought to take precedence in evaluating applicability of the Doctrine of Fair Use.

It is relevant to note, that the ratio of the EBC Reader case [2007] is relating to

34 *Ibid.*

35 Muhammad Saad Uddin, "Stochastic Parrots: A Novel Look at Large Language Models and Their Limitations, Towards AI", Apr. 13, 2023, *available at:* https://towardsai.net/p/machine-learning/stochastic-parrots-anovel-look-at-large-language-models-and-their-limitations. (last visited on May 23, 2024)

36 David Nield, "How ChatGPT and Other LLMs Work—And Where They Could Go Next", *Wired*, Apr. 30, 2023, *available at:* https://www.wired.com/story/how-chatgpt-works-large-language-model/.(last visited on May 23, 2024)

37 *Supra* note 12 at 3.

38 *Supra* note 32.

39 *Ibid.*

40 *Supra* note 2 at 2.

originality of the derivative work in context to the Idea-Expression Dichotomy. It does not relate to a work that has unequivocally referred to a copyrighted work, and is now claiming defence of fair use. In other words, the EBC Reader [2007] case was specifically concerning the "originality" of the derivative work, and not the "transformativeness" of the derivative work.

In premise to this copyright conception, it is contended that "transformativeness" jurisprudentially is a derivative of "originality". When deliberating on the applicability of the Doctrine of Fair Use, the Indian Courts adjudicate on the distinctiveness of the derivative work compared to the original work. Inevitably, whether it is to claim copyright or claim a fair use of copyright, "originality" is supreme in all aspects of copyright law. In furtherance to this understanding, it is argued that the Test of Originality from the EBC Reader [2007] case be brought within the purview of the test for applicability for defence of fair use.

The restriction of the transformative criteria of the Doctrine of Fair Use to the qualitative scale, facilitates the examination of the Modicum of Creativity as the pertinent substantive test of copyright law for the Doctrine of Fair Use. Under this test, the fundamentally relevant factors becomes the:

i. Useful additions from other sources of art

ii. Value added from derivative author's application of mind

iii. Alteration of purpose & essence of the derivative work

The consideration of these three phenomenological criteria in the adjudication of fair-use applicability is incremental in nature, and is subject to the garden variety nature of the interests of the artist and the public as recognized by the Hon'ble Courts. By upholding these three factors in fair-use adjudication, priority and recognition is given to creativity and emotional rhetoric of the author of the original work, as well as the derivative work