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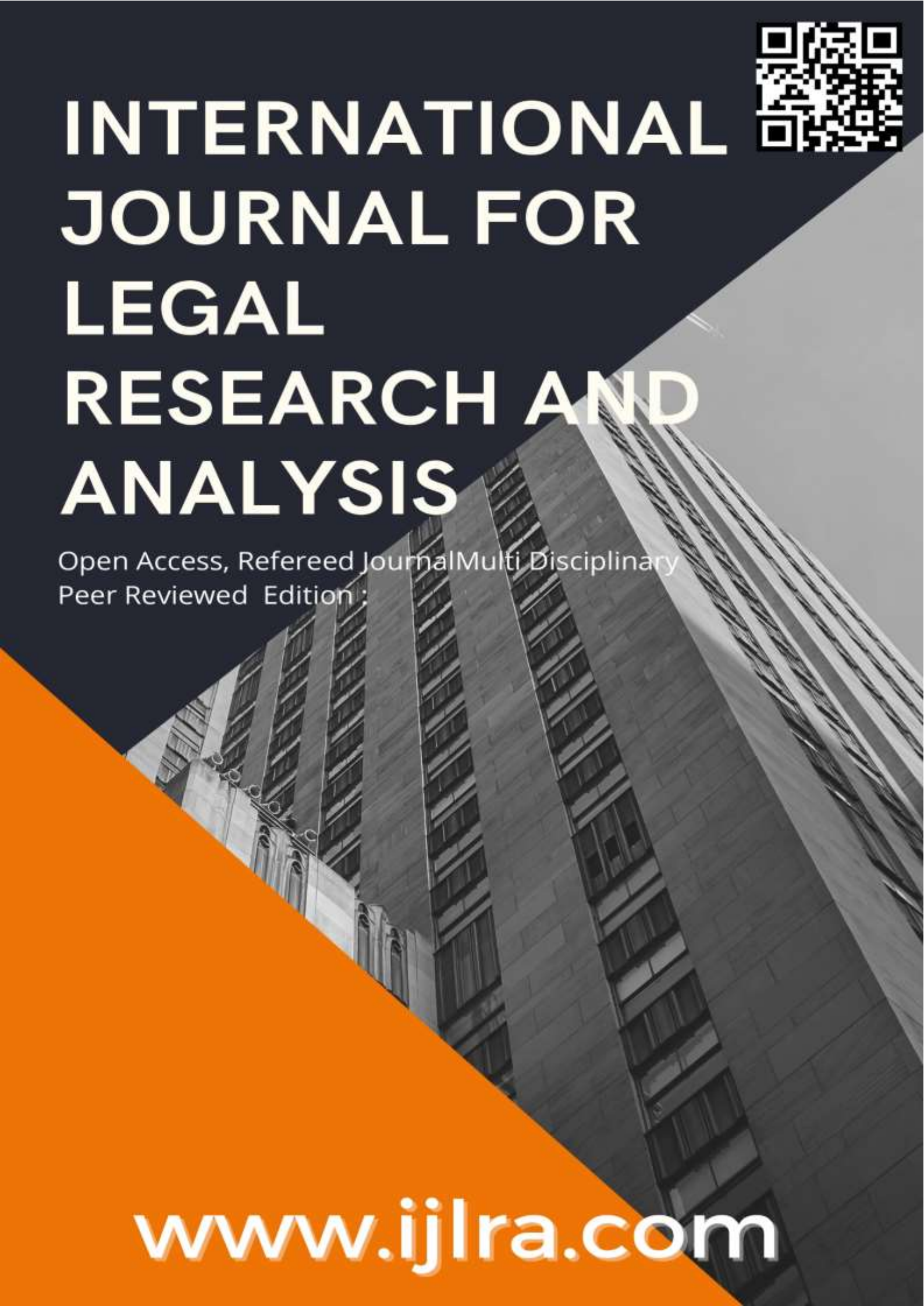

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BERNE CONVENTION ON PROTECTION OF LITERARY AND ARTISTIC WORKS

AUTHORED BY - VANSHIK DATTA

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ACKNOWLEDGMENT

I take this opportunity to express our profound gratitude and deep regard to our guide **……..**for his/her exemplary guidance, monitoring and constant encouragement throughout the course of this term paper. The invaluable suggestions and inputs given by her from time to time have enabled me to complete this term paper with ease.

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Last but not the least, I thank almighty, my parents and my friends for their constant support and encouragement without which this research work would not be possible.

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ABSTRACT

Copyright is one of the main branches of the intellectual property rights that has gained economic importance with time. It confers a bundle of exclusive rights on creators of original works for commercially exploiting their works. However, these rights are never absolute and are subject to limitations. One such limitation is fair use. Fair use permits the use of the copyrighted works forspecific purposes without the authorisation of the copyright owners. It aims to prevent the conflict between the creators and the users and ensure that the benefitsof creativity must reach society.

The international instruments on copyright law have long contained provisions related to this limitation. The Berne Convention for the Protection of Literary and Artistic Works, 1886 (the Berne Convention), since its inception, contained two narrow copyright exceptions. The Stockholm Act, 1967 revised the convention and introduced the three step test under article 9(2). This provision permits reproduction of works in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. A similar exception is also incorporated in the Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 (the TRIPS Agreement), the WIPO Copyright Treaty, 1996 (the WCT), and the WIPO Performances and Phonograms Treaty, 1996 (the WPPT). The generality of this provision led to significant differences in the national copyright law.

The WIPO Standing Committee on Copyright and Related Rights (SCCR) is engaged in deliberations in this area and has considered the requirement of cooperation at the international level on copyright exceptions specifically for the educational institutions, libraries, and persons with disabilities. Further, the Draft Treaty on Access to Knowledge, 2005 and the Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives, 2013 recognise the need for a minimum level of harmonisation on copyright limitations and exception.

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LIST OF ABBREVIATIONS

1.	AC	Appeal Cases
2.	ACopyT	Australian Copyright Tribunal
3.	AIR	All India Reporter
4.	All ER	All England Law Reports
5.	All.	Allahabad
6.	ALR	Australian Law Reports
7.	ALT	Andhra Law Times
8.	Art.	Article
9.	ASIL	Annual Survey of Indian Law
10.	Berkeley Tech. L.J.	Berkeley Technology Law Journal
11.	Bom CR	Bombay Cases Reporter
12.	Bom.	Bombay
13.	Brook. Law Rev.	Brooklyn Law Review
14.	Cal.	Calcutta
15.	Cardozo Arts & Ent. L.J.	Cardozo Arts and Entertainment Law Journal
16.	Cas. W. Res. L. Rev.	Case Western Reserve Law Review
17.	CCC	Copyright Clearance Centre
18.	Ch.	Chancery Division
19.	CLA	Copyright Licensing Agency
20.	CLR	Copyright Law Reporter
21.	Co.	Company
22.	Colum. L. Rev.	Columbia Law Review
23.	Copyright L. Symp.	Copyright Law Symposium
24.	Cornell L. Rev.	Cornell Law Review
25.	Corp.	Corporation

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26.	Cri L.J.	Criminal Law Journal
27.	DB	Division Bench
28.	Del.	Delhi
29.	Denv. U. L. Rev.	Denver University Law Review
30.	DLT	Delhi Law Times
31.	DRJ	Delhi Reported Judgments
32.	Ed.	Editor
33.	Edn.	Edition
34.	EIFL	Electronic Information for Libraries
35.	EMLR	Entertainment and Media Law Reports
36.	Emory L. J.	Emory Law Journal
37.	ER	English Reports
38.	F. 3d	Federal Reporter Third Series
39.	F. Cas.	Federal Cases

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CHAPTER 1 INTRODUCTION

1.1 BACKGROUND

The 21st century is considered a knowledge era where the nation‟s progress is driven by creativity and innovation which is stimulated by Intellectual Property Rights (IPR) laws. The vision statement of the National Intellectual Property Rights Policy, 2016 of India reflects that "…knowledge is the main driver of development, and knowledge owned [has to be] transformed into knowledge shared." IP plays a significant role in the overall development of any industry, commerce and trade. It is a source of wealth creation and economic growth. It is designed to serve a useful social end by contributing to the growth of creative and innovative efforts in every field of human endeavour.[2] The creation of IP is essential for the growth and development of any economy for which robust and effective IPR laws are required. It is said that, "without a legal monopoly not enough information will be produced, but with the legal monopoly too little of the information will be used."[1] The dissemination and use of works protected under IPR laws are inevitable for the development of society. Hence, the balance between the interests of right owners and users has to be achieved. It is rightly pointed out that the legal duties should be imposed on owners of IPRs inorder to provide some protection for the competing interests.[2]

Education lays the foundation for developing an equitable, progressive andprosperous society and is fundamental for achieving full human potential.

Education is valuable to humankind as it is the most effective tool for the empowerment of an individual and is a prerequisite for every individual in modern society. In *The Chancellor, Masters and Scholars of University of Oxford*

v. *Rameshwari Photocopy Services,*[3] the court observed that:[4]

The importance of education lies in the fact that education alone is the foundation on which a progressive and prosperous society can be built. Teaching is an essential part of

[1] Robert Cooter and Thomas Ulen, *Law and Economics* 135 (Scott, Foresman and Co., London, 1988) cited in Paul Goldstein, "Copyright" 55(2) *Law & Contemp. Probs.* 79, 82 (1992).
[2] Jacqueline Lipton, "Information Property: Rights and Responsibilities" 56 *Fla. L. Rev.* 135 (2004)
[3] 2016 SCC OnLine Del 6229.
[4] (1981) 1 SCC 608, 618-619.

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education, at least in the formative years, and perhaps till post-graduate level. It would be difficult for a human to educate herself without somebody: a teacher, helping. It is thus necessary, by whatever nomenclature we may call them, that development of knowledge modules, having the right content, to take care of the needs of the learner is encouraged. So fundamental is education to a society- it warrants the promotion of equitable access to knowledge to all segmentsof the society, irrespective of their caste, creed and financial position. Of course, the more indigent the learner, the greater the responsibility toensure equitable access.

The right to education is a fundamental human right recognised in several international instruments on human rights.[7] Right to education includes within its manifold right to read and right to have access to reading materials. In *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*,[8] the Supreme Court observed that, "the right to life includes the right to live with human dignity andall that goes along with it, namely, the bare necessities of life...and facilities for reading, writing and expressing oneself in diverse forms." This right to access reading materials comes in direct conflict with the IPR regime. Further, every country is undergoing rapid changes in the knowledge landscape in terms of technological advancements. The Indian National Education Policy, 2020recognises the potential of online education and extensive use of technology in education. The use of technology in education has also raised many concerns related to IPRs.

1.2 COPYRIGHT AND EDUCATION

Copyright is one of the branches of the IPR and refers to a bundle of exclusive rights conferred on creators of original works. It is regarded as a "social bargain in which writers are rewarded…on the condition that their creations eventually will be freely available to everyone."[5] Every society is premised upon wide dissemination of information and copyright is one way to ensure that societyhas access to the information it needs. In this regard, copyright is referred to as, "a codification of a balance between the interest of authors in financial returns

[5] Comment, "Photocopying and Fair Use: An Examination of the Economic Factor in Fair Use"26 *Emory L. J.* 849 (1977).

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from their work and the interest of the public in access to that work."[6]

Copyright and education have a troubled history together. It is clear fromthis observation:[7]

> What is copyright? A policymaker…will tell you that copyright is an instrument of consumer welfare, stimulating the production of the widest possible array of literary and artistic works at the lowest possible price... Ask the question [to] a…trade official and she will tell you that copyright is one of the strongest net contributors to the nation"s balance of trade. Ask the question [to] a school teacher…and he will tell you that copyright is what stands in the way of getting textbooks into the hands of hisstudents.

The use of copyrighted materials is unavoidable in educational institutions. The copyrighted works promote learning and knowledge, and for this,the copyright law benefits authors by granting a temporary monopoly and, at the same time, ensures public access to the copyrighted works as works are protected for a limited time. However, access to works is required even during the duration of the copyright protection.[8] The goal of learning cannot wait until the copyright term comes to an end. There is a vital link between learning and liberty, and this link is subject to the control of copyright owners. If the absolute rights are conferred on the owners of the works, then copyright law will be used merely to promote the accumulation of wealth by the copyright owners and it will be the beginning of tyranny as the copyright owners will take away the liberty to learn.

Further, the creation of new works depends on the existing copyrighted materials as the new author relies upon such works to develop his expression. Other intellectual activities such as research, criticism, history and philosophy require reference to the existing works. Also, it has been argued that the markets will operate more efficiently with greater public access to information.[9] It is clearfrom the fact that the object of publishing a book is to communicate it to the world the knowledge it contains, but this object will be frustrated if the knowledge could not be used without infringement.[10] In this context, the ultimate task of the copyright

[6] Justin Hughes, "Fair Use Across Time" 50 *UCLA L. Rev.* 775, 784 (2002-2003).
[7] Dan Thu Thi Phan, "Will Fair Use Function on the Internet?" 98(1) *Colum. L. Rev.* 169, 175- 176 (1998).
[8] Matthew A. Eisenstein, "An Economic Analysis of Fair Use Defense in Leibovitz v. Paramount Pictures Corporation" 148(3) *University of Pennsylvania Law Review* 889, 895 (2000).
[9] L. Ray Patterson, "Understanding Fair Use" 55 *Law & Contemp. Probs.* 249, 266 (1992).
[10] *Baker* v. *Selden,* 101 U.S. 99, 103 (1879).

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law is to strike a fair balance between the author"s right to control the dissemination of his works and the public interest in fostering widest dissemination.[21] Striking the correct balance between access and incentives has been described as the central problem in copyright law by Landes and Posner.

The public libraries play an essential function in educational upliftment as they act as "the local gateway to knowledge [and] provide a basic condition for lifelong learning, independent decision making and cultural development of the individual and social groups." Libraries act as an intermediary between usersand copyrighted works. Libraries provide access of the copyrighted works to the public and occasionally make copies of the portion of the work for the users. Libraries also make copies of the work for restoration or preservation. Therefore, the use of copyrighted materials is indispensable for the libraries to perform their primary functions.

The right to access to reading materials is a facet of the right to education. However, over 90% of all published materials are not available in accessible formats like braille, e-text, large print, audio editions, daisy, *etc.* for persons with disabilities, which has led to global book famine.[11] Unavailability of reading materials lead to denial of right to education which in turn lead to denial of other human rights like right to employment and freedom of speech and expression. It isclaimed by many organisations working in the area of print disabled rights that copyright constitutes one of the most challenging barriers in the access to reading materials for them.[25]

1.3 FAIR USE AND EDUCATION

Copyright law confers exclusive rights on the creators, like the right to reproduce, distribute, make derivative works and publicly display or perform the work; however, these rights are never absolute. There are restrictions imposed on these rights under copyright law. The rights are usually limited in time; in certain cases, creators are deprived of their exclusive rights but are given equitableremuneration for the exploitation of the work through compulsory licensing

[11] William M. Landes and Richard A. Posner, "An Economic Analysis of Copyright Law" 18(2) *J.Leg. Stsud.* 325, 326 (1989).

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and statutory licensing, and; in certain cases, creators are neither left with an exclusiveright nor a statutory right of remuneration by providing for permitted acts or fair use. The present work is premised on the last restriction, *i.e.*, fair use. Copyright law prohibits others from exploiting the works of the creators without their consent. However, for specific purposes, it permits the use of copyrighted works without the permission of the creator under what has come to be referred to as fairuse, fair dealing, exceptions, limitations, restrictions or permitted acts in different national legislations. It is correctly said that, "…fair use as an instrument of knowledge has been copyright"s stepchild."[26] Fair use legitimises certain uses of copyrighted works to secure a balance between the interests of owners and interests of the public.[12] It exists to encourage creativity and promote the productive use of existing works.[13] Fair use involves a balancing process in which a number of factors determine the interests that outweighs the rights of creators.

The primary issue about the doctrine of fair use is the definition of the term fair use itself. As rightly stated:

> What is fair use? We would all appreciate a clear, crisp answer…Far from clear and crisp, fair use is better described as a shadowy territory whose boundaries are disputed, more so now that it includes cyberspace than ever before…Many legal scholars, politicians, copyright owners and users and their lawyers agree that fair use is so hard to understand that it fails to provide effective guidance for the use of others" works today. But the fact is, we really must understand and rely on it.

All the international instruments relating to copyright law have provisions dealing with copyright exceptions. However, the World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR) is engaged in discussions related to copyright exceptions. It is crucial to analyse the provisions related to copyright exceptions in the international instruments and to look at the deliberations of the WIPO SCCR to understand the issues related to fair use.

[12] Gideon Parchomovsky and Kevin A. Goldman, "Fair Use Harbors" 93 *Va. L. Rev.* 1483, 1484(2007).
[13] Michael W. Carroll, "Fixing Fair Use" 85 *N.C.L. Rev.* 1087, 1088 (2006-2007).

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In India, sections 52 and 39 of the Copyright Act, 1957carves out certain exceptions referred to as „certain acts not to be infringement of copyright" and „acts not infringing broadcast reproduction right and performer"s right",respectively. The Copyright Amendment Act, 2012 brought substantial changes to section 52 and the changes so brought were claimed to be important, keeping inmind the needs and the technological advancements. Therefore, it is essential tocritically analyse these amendments to understand the scope of copyrightexceptions in India completely.[14]

The issue related to fair use in the context of education is rightly explainedas follows:

> What does education want in the copyright law? Briefly, education wants to be enabled to perform its vital role…And to do this, educational institutions must have maximum availability of teaching material andteaching resources of all kinds…To some extent the hindrances placed upon effective education by the Copyright Law have been alleviated by the judicially developed doctrine of fair use which provides a modicum of help…Increasing commercial pressures by copyright owners have caused such uncertainty as to what necessary educational uses are within fair use as to render the rule of only minimal value for the classroom teacher.

The traditional methods of copying imposed quantitative limitations. However, the development of modern methods of reprography enabled multiple inexpensive copies of printed work, which in turn increased availability andfacilitated education, specifically the reproduction of copyrighted works by teachers for distribution to students. The technological advancements increased the tension between the copyright owners and the need of the students. In India, inAugust 2012, a copyright infringement suit was filed by few international publishers against the University of Delhi and the photocopier operating in the university"s premises. The photocopier was making photostatted course packs for the students. The Delhi High Court in the year 2016, in *The Chancellor, Masters and Scholars of the University of Oxford* v. *Rameshwari Photocopy Services,*[15] held that whether the making of course packs amounts to infringement is aquestion of law and requires no trial. The court dismissed the suit

[14] Thomas E. Blackwell, "The Law of Copyright and the Fair Use Doctrine" 1 *J.C. &U.L*.222, 224 (1973-1974).
[15] (2016) 160 DRJ (SN) 678.

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and concluded that the action of the defendants does not constitute infringement. An appeal was filed against the decision of the single judge and the division bench passed the judgment in *The Chancellor, Masters and Scholars of University of Oxford* v. *Rameshwari Photocopy Services.*[16] The court set aside the judgment of the single judge and held that there is a triable issue on fact. The suit was restored for trial on the issue of fact.

However, in March 2017, the publishers withdrew the suit and issued a public statement that they have decided not to pursue the case and will not be submitting an appeal to the Supreme Court. In the public statement, the publishers expressed their intention to work more closely with academic institutions, teachers and students to address their needs and support equitable access to knowledge. In April 2017, the Indian Reprographic Rights Organization (IRRO) filed a Special Leave Petition (SLP) before the Supreme Court challenging the decision of the division bench. The Supreme Court passed the order on May 9, 2017, in which it refused to interfere with the impugned judgment and dismissed the SLP. The judgments in this case affect not only University of Delhi but also every educational institution in India and tie the right to education with the copyright law.

This particular instance brought educational exceptions in India under consideration. The statutory provisions indicate that the law in India does not expressly deal with the issue of photocopying of copyrighted works for educational purposes. Still, the same can be covered under the fair dealing provision in section 52(1)(a)(i) for private or personal use, including research or section 52(1)(i) which provides for the reproduction of a work by a teacher or pupil in the course of instruction. Therefore, the issue of unauthorized reproduction of the copyrighted works by way of photocopying for educational purposes needs to be addressed in light of the statutory provisions and by analysing how other countries have dealt with the same issue. In addition to this, this case brought forth the role of the collective administration society, *i.e.*, IRROin the picture, which may help balance the conflicting interests.

1.4 RESEARCH PROBLEM

[16] (2016) 235 DLT 409 (DB).

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The present research attempts to study fair use and the contemporaryissues in this area. The research focuses on analysing the interpretation accordedto section 52 and section 39 of the Indian Copyright Act, 1957, which provide a closed list of exceptions and the factors taken into consideration by the judiciary while interpreting the same. Significant amendments were introduced by theCopyright Amendment Act, 2012 in section 52 related to the extension of fair dealing provisions, exception relating to public libraries, notable exception for persons with disabilities and insertion of certain new exceptions to meet technological advancements. These amendments are required to be critically analysed to study their implications.

The impact of copyright law on educational establishments has become a matter of debate over recent years. The never ending tussle between the copyright owners and the users has reached a new height with the technological advances in making copies of the copyrighted works. On the one side, copyright owners and, more specifically, the publishers, have become more militant to protect theirrights against unauthorised copying. They believe that this may drive them out of business. On the other side, the educational institutions want the advantage of making copies of the copyrighted works with ease to meet the requirements and expectations of students. The classroom copying, that is, the distribution ofcopies of articles and extracts from copyrighted works to the students, lies at the heart of recent controversies.

The doctrine of fair use or fair dealing is a significant concept in copyrightlaw as it seeks to balance the societal interest as opposed to the personal interestof the owners of the copyright. However, despite its importance in copyright law, the concept remains relatively unexplored in India in general and particularly in the educational context. On the other hand, in other countries, specifically in the USA, the concept of fair use has been refined over the past few decades through various judicial pronouncements and by formulating guidelines regarding fair use for educational purposes. Therefore, it is important for a proper treatment of the problem of photocopying for educational purposes in the context of the doctrine of fair use that a comparative analysis is made in this regard. Lastly, it is important to study the efficacy of setting up of the Reprographic Rights Organisation (RRO) proposed at the international level and was adopted at the national level to deal with the unauthorized reprography.

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1.5 SCOPE OF THE STUDY

The scope of this research is restricted to understanding the concept of copyright and fair use and its justifications. It further traces the evolution of copyright law from bilateralism to multilateralism at the international level. It analyses the multilateral international instruments on copyright law with specific discussion on copyright exceptions provisions under the instruments. It also discusses the reports of the WIPO SCCR. It critically analyses sections 52 and 39of the Indian Copyright Act, 1957 and the amendments so introduced in 2012. Further, a comparative study of the relevant statutory provisions, judicial decisions and practices in the United States of America (USA), the United Kingdom (UK), Germany, Canada and Australia relating to fair use for educational purposes has been made. It highlights the concern of photocopying of copyrighted works and the role played by the collective administration societies, specifically RROs.

1.6 STATEMENT OF OBJECTIVES

The specific objective of this research is to study the law relating todoctrine of fair use under copyright law and to understand the rationale behind its recognition in the legislation of almost every country. In India, the courts have taken into account various factors while interpreting sections 52 and 39 of the Copyright Act, 1957, for which the judicial pronouncements in this area areanalysed. Significant changes were introduced in the year 2012 to section 52, which are critically examined, and the missed opportunities are pointed out. The scope of exceptions for educational purposes is still uncertain in India; therefore a comparative study is made to suggest the best practice that India can adopt. The photocopying of copyrighted works for educational purposes demands sympathy because it is for social benefit and never involves any commercial exploitation. However, a consistent application of the practice has the tendency of reducing the value of the copyrighted works and therefore, demands that certain restrictions be imposed on such practice. For this, the solution proposed at the international level is discussed and the working of the RROs is examined. The objectives of the research are as follows:

- To expound on the concept of copyright and fair use generally by studyingand analyzing

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the scholarly works on this area.

- To trace out the evolution and trends in the fair use provisions at the international level by analyzing the international instruments on copyright and the discussions and deliberations of the WIPO SCCR.

- To analyse the interpretation accorded to sections 52 and 39 of the Indian Copyright Act, 1957 through the judicial pronouncements.

- To critically examine the Copyright (Amendment) Act, 2012 concerning fair use provision to point out the missed opportunities.

- To examine how the problem of photocopying of copyrighted works is addressed at the international level and the national level.

1.7 RESEARCH QUESTIONS

For the objectives above stated, the researcher has formulated thefollowing research questions:

- How far the fair use provisions under sections 52 and 39 of the Indian Copyright Act, 1957 successfully prevented the conflict between the creators, disseminators and society?

- Whether the amendments introduced under section 52 by way of the Copyright Amendment Act, 2012 ensure that fair use survives in a digital era?

- To what extent photocopying of copyrighted works for educational purposes constitutes fair use under section 52 of the Indian Copyright Act, 1957?

- Whether there is a requirement of framing guidelines to regulate photocopying of copyrighted works in educational institutions?

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1.8 HYPOTHESES

For the present research, the researcher has formulated followinghypotheses:

- Fair Use provisions under copyright law are important for preserving the fundamental human and constitutional rights of the individuals and for the dissemination of knowledge.
- Exceptions related to the educational purpose under section 52 of the Indian Copyright Act, 1957 are inflexible, and there is a considerable amount of uncertainty surrounding the scope and operation of these exceptions.
- There are major differences in national copyright law of various countries in the area of exceptions in relation to educational purposes, and uniformity cannot be sought because of different priorities.
- Photocopying for educational purposes will constitute fair use only with certain restrictions. The collective administration society known as the reprographic rights organisation can be helpful in balancing the conflictinginterest of the authors/publishers and the student community in relation to photocopying of copyrighted works.

1.9 METHODOLOGY

The research methodology followed is the doctrinal method. The researcher relied on both primary and secondary sources of information for the theory purpose. The emphasis is on analysing the development of copyright law in general and fair use provisions in the international instruments on copyright law. The legal provisions related to the doctrine of fair use in India are critically analysed with the help of judicial decisions, authoritative texts and scholarlyworks on the subject matter. The research focuses on critically analysing provisions and judicial decisions where the courts were confronted with the issue of fair use in relation to the educational purposes in other jurisdiction, including USA, UK, Canada, Australia and Germany. A comparative study is made to assess the flexibility of the provisions and the best practices that India can adopt. The provisions related to the collective administration societies

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in India andworking of IRRO with the help of scholarly works, judicial pronouncements and the data available are analysed.

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1.10 LITERATURE REVIEW

Based on the survey of the literature, the researcher has observed that there is no deficiency of literature on the concept of fair use and the statutory analysis of the same, both from international and national perspectives. There are various books available, though not specifically on fair use in the educational context. However, various articles address fair use in the educational context.

In an article by Wendy J Gordan,[17] the author argued that fair use is a liberty right. Fair use aims, among other things, to assist citizens in deploying copyrighted works as part of their expressive activities. In particular, it gives the freedom that the market may be unable to give or freedoms for which the marketis a normatively inappropriate rationing institution. The author concluded that for fair use to serve its purposes, we need to do more than keep it in the books. The institutions must make it practical to employ. Mattew Sag,[18] in his article assessed the statutory fair use factors and the predictability of fair use outcomes in litigation in the USA. The author concluded that, "fair use doctrine is morerational and consistent than is commonly understood." Neil Weinstock Netanel,[19] also address the concern regarding unpredictability attached to the fair use doctrine in his article. The author at length analysed the judgments of courts in theUSA and concluded that fair use doctrine is a different doctrine in contrast to ten or twenty years ago, and now the transformative use paradigm dominates the fair use doctrine which has brought greater consistency.

Lucie M.C.R. Guibault,[20] discussed the rationale behind fair use, wherein the author has argued that the protection of constitutional rights, regulation of industry practice and competition, dissemination of knowledge, and market failure considerations are the basic premise on which the fair use doctrine is recognised. The author further argues that limitation or exceptions are generally adopted based on one or more of the four rationales. There are significant differences in the limitations existing under the national laws of various countries,

[17] Wendy J. Gordon, "Fair Use: Threat or Threatened?" 55(4) *Case Western Reserve L. Rev.* 904(2004).
[18] Matthew Sag, "Predicting Fair Use" 73 *Ohio St. L. J.* 47, 53 (2012).
[19] Neil Weinstock Netanel, "Making Sense of Fair Use" 15 *Lewis & Clark L. Rev.* 715 (2011).
[20] Lucie M.C.R. Guibault, *Copyright Limitations and Contracts* (Kluwer Law International, UK,2002).

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which may be attributed to the distinct foundation on which the copyright system of every country rests. Pierre N. Leval[21] discussed the nature and contours of fair use and pointed out that fair use is a fundamental policy of the copyright law and concluded that for a proper understanding of fair use, the focus should be on the utilitarian principle. Jacob Zweig,[22] in his article has argued that the flexible copyright exception like fair use doctrine in USA is necessary to protect the freedom of expression.

The statutory provisions, administrative regulations and judicial pronouncements on the doctrine of fair use in India are elaborately discussed by authors like P. Naraynan,[23] V.K. Ahuja,[24] Alka Chawla,[25] Raghbir Singh[26] and
N.S. Gopalakrishnan and T.G. Agitha in their respective books.

1.11 SCHEME OF THE STUDY

Keeping in mind the research problem and the scope of the problem, the thesis is divided into the following six chapters:

Chapter 1: Introduction

This chapter elaborates the importance and significance of the research undertaken by the researcher and discusses the scope of the study. It begins by highlighting that the critical issue in copyright law is how to balance the tension between the copyright proprietors‟ desire to restrict access and the public‟s interest in freely using the protected works. The next issue highlighted in this chapter is the impact of copyright law on educational establishments and access toknowledge and the debate surrounding it in the context of fair use. Based on these issues, the researcher has formulated research questions and hypothesis which are mentioned in this chapter.

[21] Pierre N. Leval, "Towards a Fair Use Standard" 103 *Harv. L. Rev.* 1105 (1990).
[22] Jacob Zweig, "Fair Use as Free Speech Fundamental: How Copyright Law Creates a Conflict Between International Intellectual Property and Human Rights Treaties" 64 *Hastings L. J.* 1549 (2012-2013).
[23] P. Narayanan, *Law of Copyright and Industrial Designs* (Eastern Law House, New Delhi, 2002).
[24] V.K. Ahuja, *Law of Copyright and Neighbouring Rights: National and International Perspectives* (Lexis Nexis, New Delhi, 2nd edn., 2015).
[25] Alka Chawla, *Law of Copyright: Comparative Perspectives* (LexisNexis, Gurgaon, 2013).
[26] Raghbir Singh, *Iyengars'- Commentary on the Copyright Act* (Universal Law Publication, New Delhi, 2013).

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Chapter 2: Copyright and Fair Use: A Theoretical Framework

The chapter begins with a discussion on the concept of property andcategories of property. It acknowledges that with technological advancement, IPis the most precious form of property. It discusses the definitions of the IPRs and highlights the arguments of various authors that it will be appropriate to rename IPR. The next part of the chapter focuses on understanding the term copyright by relying on multiple definitions. It discusses the works protected under copyright law and the basic requirements for the grant of copyright. Further, it discusses the philosophical justification of copyright. The chapter further traces the development of copyright law in India, and the amendments made to the Copyright Act, 1957 are also discussed in detail. This chapter discusses theevolution of fair use. It also discusses the definition of the term fair use. It further analyses the rationale behind fair use provisions in the statute.

Chapter 3: Berne convention on artistic and literary work

This chapter traces the evolution of copyright law and discusses the journey of copyright law from bilateralism to multilateralism. Further, all the provisions for fair use under the international instruments are specifically discussed. It elaborates on the deliberations and studies presented in the meetings of the WIPO SCCR related to exceptions and limitations.

Chapter 4: Photocopying of Copyrighted Works and Licensing Practices forEducational Purposes

This chapter begins with a discussion on the concept of licensing under copyright law and the collective administration of copyright in general. It further discusses how the issue of photocopying of copyrighted works was addressed at the international level.It further discusses the working of the International Federation of Reproduction Rights Organisation (IFRRO). It also discusses the national efforts and highlights that the countries have established the RRO; however, their working has always been questioned.

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Chapter 5: Conclusion and Suggestions

This chapter winds up the research by summarising the findings and put forth certain suggestions to balance the interest of the copyright owners and the users. It reflects upon the changes required to be brought under the legislation.

1.12 LIMITATIONS OF THE STUDY

- The areas like protection of technological measures, parallel importation, cross-border uses, compulsory and statutory licensing are not discussed. However, these areas also have a bearing upon the access to knowledge, and these areas can independently be a subject matter of research.

- The role of Reprographic Rights Organisations are only discussed in relation to licensing for photocopying of copyrighted works for educational purposes and does not cover licensing of works for otherpurposes.

1.13 SCOPE FOR FUTURE RESEARCH

- Future research can specifically be on the area of online education or digital education which may incorporate aspects related to protection of technological measures and jurisdiction issues.

- Future research can also be on the area of developing the content of the International Instrument on Copyright Exceptions and Limitations for Educational Purpose by taking into consideration the three step test mentioned in the current international instruments on copyright.

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CHAPTER 2

COPYRIGHT AND FAIR USE: A THEORITICALFRAMEWORK

2.1 INTRODUCTION

The concept of property has undergone myriad changes over a periodof time. It was initially unfamiliar to human beings but later they recognised movables and chattels as property. With the progress, the land also came to be recognised as a form of property and with the advancement of science and technology, scientific knowledge is also recognised as a form of property.[27] At present, globally, the intellectual property (IP) is the most precious form of theproperty when compared to other forms of property. It is widely acknowledged now that the IP is the knowledge with commercial value andthe economic development of nations depends upon their IP. It is rightly said:[28]

> IP could be called the Cinderella of the new economy. A drab but useful servant, consigned to the dusty and uneventful offices of corporate legal departments until the princess of globalisation andtechnological innovation-revealing her true value-swept her to prominence and gave her an enticing new allure.

Property, in legal terms, means all the rights which a person has. A man‟s property is all that is his in law. In *R.C. Cooper* v. *Union of India*,[29] the Supreme Court defined the term „property‟ as the „highest right a man can have to anything.‟ It includes the right which one has to land or goods and includes ownership, estates and interests and rights such as trademarks, copyright, patents and rights *in personam* which can be transferred or a thing having a value in money with reference to transfer or succession and its

[27] Elizabeth Verkey, *Intellectual Property* 1 (Eastern Book Company, Lucknow, 2015).
[28] Kamil Idris, *Intellectual Property: A Power Tool For Economic Growth* 24 (WIPO, Geneva,2003).
[29] AIR 1970 SC 564, 591.

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capacity of being injured. In *K.T. Plantation Pvt. Ltd.* v. *State of Karnataka*,[30] the court observed that:

Article 300A of the Constitution proclaims that no person can be deprived of his property save by authority of law, meaning thereby that aperson cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without any support of law made by a competent legislature and that the expression „property" in Article 300A is not confined to land alone but also includes intangibles like copyright and other intellectual property and embraces every possible interest recognised by law.

There are two categories of property, corporeal property and incorporeal property. Corporeal property has a tangible existence and can be touched. It is related to material things such as land, house, ornaments etc. On the other hand, incorporeal property is intangible as its existence is not visible and cannot be touched. Easement rights, actionable claims, goodwill and IPRsare intangible property. The word „property" indicates that IP confers bundle of rights on the owner and like any other form of property, the owner has the right to transfer property to another person, the right to exploit for commercialbenefit and the right to exclusive use. Holmes J. in *White-Smith Music Publishing Co.* v. *Apollo Co.*,[31] while explaining special characteristics ofcopyright as property observed that:

The notion of property starts…from confirmed possession of a tangible object, and consists in the right to exclude others from interference with the more or less free doing with it as one wills. Butin copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, butis *in vacuo*…It restrains the spontaneity of men where, but for it, there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the

party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong.

[30] (2011) 9 SCC 1.
[31] 209 U.S. 1 (1908).

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2.2 UNDERSTANDING INTELLECTUAL PROPERTY RIGHTS

Intellectual property rights (IPRs) are property rights granting limited monopoly over innovations or creations fulfilling minimum requirements as prescribed in the law. IP refers to creations of the mind- inventions; literary and artistic works; and symbols, names and images used in commerce. According to the WIPO, IPRs mean the legal rights, which result from intellectual activity in the industrial, scientific, literary and artistic fields. It is an intangible and incorporeal property.[32] Further, the term IP refers to group of different doctrines which regulates the use of different sorts of ideas and insignia. It denotes the rights over a tangible object of the person whose mental efforts created it.[33] IPRs are the exclusive rights conferred on the owners or creators of the work to allow them to benefit from their own creations by using the same and by excluding others from using the same. It is characterised as exclusionary rights granted by governments in their respectivecountries.[34]

Black‟s Law Dictionary defines IP as:

> A category of intangible rights protecting commercially valuable products of the human intellect. The category comprises primarilytrademark, copyright and patent rights, but also includes trade secret rights, publicity rights, moral rights, and rights against unfair competition.

IP is a generic term and was initially divided into two branches, Copyright and Industrial Property. The Berne Convention for the Protection ofLiterary and Artistic Works, 1886 (the Berne Convention) dealt with copyrightin literary and artistic works. Article 4 of the Berne Convention (in its original form), defined „literary and artistic works‟ as:

> The expression „literary and artistic works‟ shall include books, pamphlets, and all other writings; dramatic or dramatico-musical works, musical compositions with or without words; works of drawing, painting, sculpture and engraving; lithographs, illustrations, geographical charts; plans, sketches, and plastic works relative to geography, topography, architecture, or science in general; in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any

[32] World Intellectual Property Organisation, *Intellectual Property Reading Material* 5 (WIPO,Geneva, Switzerland,1995).
[33] Elizabeth Verkey, *Law of Patents* 1 (Eastern Book Company, Lucknow, 2012).
[34] Ashwani Kumar Bansal, *Law of Trademarks in India* 1 (Thomson Reuters., New Delhi, 3rdedn., 2014).

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mode of impression or reproduction.

The definition of the term „literary and artistic works" was expanded by various amendments to the Berne Convention to include within its ambit cinematographic works, photographs and musical works. Article 2 of the Berne Convention in its present form defines the term „literary and artistic works" as:

> The expression „literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans sketches and three-dimensional works relative to geography, topography, architecture or science.

On the other hand, the Paris Convention for the Protection of Industrial Property (the Paris Convention) dealt with the industrial property. Article 1(2) of the Paris Convention defines the scope of industrial protection and it includes within its ambit patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition. It is further clarified under article 1(3) of the Paris Convention that the term „industrial property" shall be understood in the broadest sense and apart from industry and commerce; it shall apply likewise to agricultural, extractive industries and to all manufactured or natural products.

2.3 UNDERSTANDING COPYRIGHT

IPR is referred to as Cinderella of new econonmy. Z. Chafee on the other hand stated: [35]

[35] Z. Chafee, "Reflections on the Law of Copyright" 45 *Columbia Law Review* 503 (1945) cited in 1 Kevin Garnett, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James onCopyright* 1 (Sweet & Maxwell, London, 2005).

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Copyright is the Cinderella of the law. Her rich older sisters, Franchises and Patents, long crowded her into the chimney-corner. Suddenly the fairy godmother, Invention, endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footmen. Now she whirls through the mad mazes of aglamorous ball.

Copyright is one of the main branches of the intellectual property which has gained economic importance with the passage of time. Copyright was originally devised to protect books from unauthorised reproduction; however, over the period of time it had faced unprecedented challenges from the accelerating pace of technological innovation.[44] In the modern world, the law of copyright provides the legal framework for the protection of the individual author of the work and also for the investment required for the creation of work. Apart from protecting the interest of the individuals, copyright also protect the industries which depend upon it for the livelihood.

As per Paul Torremans, copyright has two types of roots. Firstly, it started as an exclusive right to make copies, to reproduce the work of an author. This entrepreneurial side of copyright is linked in tightly with the invention of the printing press which made it much easier to copy a literary work and permitted the entrepreneur for the first time to make multiple identical copies. Secondly, it became vital to protect the author now that his orher work could be copied much more easily and in much higher numbers.

Copyright derives from the expression of „copie of words" first used in the context, according to the Oxford Dictionary in 1586. Chambers Encyclopedia defines copyright in its most elementary form as "the exclusive right to multiply copies of a book." However, Black"s Law Dictionary defines copyright aptly as: [36]

A property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other audiovisual works; and sound recordings) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform and display the work.

[36] P. Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* 21 (Stanford University Press, USA, 2003)

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In statutory term, copyright refers to a bundle of exclusive rights conferred by law on authors/creators of original works for commercially exploiting the work. It is a property right which subsists in certain specified types of creative work conferred by statute to an author. In this context, copyright is referred to as „right of diversity". It governs the commercial exploitation of products born out of culture in the course of day to day human activity.[37] In *Gramophone Company of India Ltd.* v. *Birendra Bahadur Pandey*,[38] the court held that:

An artistic, literary or musical work is the brain-child of an author, the fruit of his labour, and, so, considered to be his property. It is so highlycherished by all civilised nations that it is thought worthy of protection by national laws and international conventions relating to copyright.

The main purpose of its protection is to promote the progress of science and technology, arts, literature and other creative works and to encourage and reward creativity. According to Neil Weinstock, copyright system performs two functions in a civil society. Firstly, production function
i.e. copyright provide incentives for authors and publishers to contribute to thestore of knowledge. The creation of original expression and its disseminationto the public lie at the heart of any democratic civil society. Citizens rely heavily on the copyrighted works to participate in any civic association and for discussing any public issue. If the copyright law is drawn too broadly, it can impede public education. Secondly, structural function i.e. by supporting an independent market-based sector of authors and publishers, copyright achievesconsiderable independence from government administrators and private patrons who would otherwise meddle in their expressive content. Patterson and Lindberg have also maintained that copyright was invented to "enhancethe learning process of the community at large." According to them copyright law recognise moral rights for the author marketing rights for the entrepreneur and learning rights for the user. Another author stated that if we look at copyright as a proprietary concept, it enables the creator to protect the creations. However, its regulatory basis is that when the creations are presented to the public, "they become part of the stream of information whose unimpeded flow is critical to a free

[37] S. Sivakumar and Lisa P. Lukose, *Broadcasting Reproduction Right In India: Copyrightand Neighbouring Rights Issues* 18 (Indian Law Institute Publication, New Delhi, 2013).
[38] (1984) 2 SCC 534.

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society." Pierre N Leval J. wrote: [39]

> The copyright law embodies a recognition that creative intellectual activity is vital to the well-being of society. It is pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists…, in order to obtain for itself theintellectual and practical enrichment that results from creativeendeavours.

Lord Atkinson in *Macmillan & Co.* v. *K & J Cooper,*[40] expressed that, "Copyright …a statutory right…the moral basis on which the principle ofthese protective provisions rests is the eight commandment, thou shalt not steal." Lord Halsbury in *Walter* v. *Lane,*[41] observed that:

> I should very much regret it if I were compelled to come to a conclusion that the state of the law permitted one man to make a profit and to appropriate to himself what has been produced by the labour, skill and capital of another.

[39] Pierre N Leval, "Toward a Fair Use Standard" 103 *Harv. L. Rev.* 1105, 1109 (1990).
[40] (1923-24) 51 IA 109, 118.
[41] 1900 A.C. 539, 545.

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2.4 COPYRIGHT LAW IN INDIA

In India, the English Copyright Act, 1842 was held to be applicable to India by the High Court of Bombay in *MacMillan* v. *Khan Bahadur Shamsul Ulama Zaka*.[42] During the East India Company"s regime, the Indian CopyrightAct, 1847 was enacted. After that the U.K. Copyright Act, 1911 was brought into force in India by a proclamation of October, 1912.[43] This act was replaced by the Indian Copyright Act, 1914. After India attained independence in the year 1947, a new copyright act was passed in the year 1957 thatrepealed the application of the Indian Copyright Act, 1914. The Copyright Act, 1957 came into force on January 21, 1958. Krishna Iyer J. in *Indian Performing Right Society Ltd.* v. *Eastern India Motion Picture Association*,[44] discussed the necessity of the Copyright Act, 1957 and observed that:

> The creative intelligence of man is displayed in multiform ways of aesthetic expression but it often happens that economic system sooperate that the priceless divinity which we call artistic or literary creativity in man is exploited and masters, whose works are invaluableare victims of piffling payments. World opinion in defence of human right to intellectual property led to international conventions and municipal laws, commissions, codes and organisations, calculated to protect works of art. India responded to this universal need by enactingthe Copyright Act, 1957.

The preamble of the Copyright Act, 1957 read as "An Act to amendand consolidate the law relating to Copyright". However, the 1957 act not onlyamended and consolidated the law relating to copyright; it also introduced various new provisions. The main features of the Copyright Act, 1957 were: creation of a copyright office and a copyright board for registration and compulsory licensing of copyright; definition of various categories of copyrighted works and the rights conferred in such works including moral rights; provision to determine ownership; term of protection for different works; assignment and licensing of copyright; infringement of copyright andremedies against it and exceptions to the exclusive rights.

[42] ILR (1895) 19 Bom 557.
[43] Ajay Sahni, *Lal's Commentary on the Copyright Act, 1957* 5 (Delhi Law House, Delhi 4th edn., 2008).
[44] AIR 1977 SC 1443, 1452.

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2.4.A Amendments to the Copyright Act, 1957

Since its inception, the act has been amended six times, in the years 1983, 1984, 1992, 1994, 1999 and 2012 to meet the national and international requirements.

2.4.A.a The Amendments of 1983

The amendment came into force on August 9, 1984. The major changes were:

- Insertion of definition of „broadcast" under section 2 (dd).
- Amendment to section 17 with regard to the first owner of copyrightin case of any address or speech delivered in public and in case of a work made or first published by or under the direction or control of any public undertaking.
- Insertion of section 19A for disputes with respect to assignment of copyright.
- Insertion of section 28A providing term of copyright in works ofpublic undertakings.
- Insertion of section 31A relating to compulsory licence in unpublished Indian works.
- Insertion of section 32A providing licence to reproduce and publish works for certain purposes and section 32B providing for termination of licenses so issued.
- Amendments to provision relating to licence to produce and publish translations under section 32.

2.4.A.b The Amendments of 1984

The amendment came into force on October 8, 1984. The changes brought were:

- Insertion of definition of „duplicating equipment" under section 2 (hh).
- Insertion of section 52A providing particulars to be included in sound recording and video films; section 68A prescribing penalty for contravention of section 52A and section

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63A providing enhanced penalty on second and subsequent conviction.

2.4.A.c The Amendments of 1992

The amendment came into force on December 28, 1991. The amendment was brought to increase the copyright protection from fifty years to sixty years and for repealing the Copyright (Amendment) Ordinance, 1991.

2.4.A.d The Amendments of 1994

The amendment was introduced after the TRIPS Agreement and to some extent to address the challenges posed by digitisation. The amendment came into force on May 10, 1995. The major changes were:

- Insertion of a comprehensive definition of „computer programme" under section 2 (ffc).

- Insertion of definition of the term „reprography" under section 2(x).

- Amendment to the definition of author under section 2(d) (in relation to a cinematograph film or sound recording, the producer and in relation to any literary, dramatic, musical or artistic work which is computer generated, the person who causes the work to be created.).

- Amplification of the definition of „communication to the public" undersection 2 (ff).
- Every broadcasting organisation was conferred with a special right known as „broadcast reproduction right" under section 37 of the act.

- Insertion of certain acts which do not constitute infringement of copyright in relation to computer programme under section 52.

- Introduced protection for performers under Chapter VIII.

- Insertion of Chapter VII dealing with copyright societies for promoting effective

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administration of rights of the authors.

2.4.A.e The Amendments of 1999

The amendment was introduced to further comply with the obligations under the TRIPS Agreement and to respond to the challenges posed by the internet to the copyright law in accordance with the WCT. This amendment came into force on January 15, 2000. The major changes brought were:

- Increased term of rights of performers under section 38.

- Insertion of sections 40A and 42A pertaining to power of government of India to apply the provision relating to broadcasting organisations and performers.

- Amendment to section 14 to include selling or giving on commercial rental or offer for sale or for commercial rental any copy of thecomputer programme within the meaning of copyright.

2.4.A.f The Amendments of 2012

This amendment was introduced by way of the Copyright (Amendment) Bill, 2010, which was introduced in the Rajya Sabha on April 19, 2010; however the same was referred to the Standing Committee onHuman Resource Development under the chairmanship of Shri Oscar Fernandes on April 23, 2010. The committee invited comments from thestakeholders. Several stakeholders gave their inputs after considering which the committee submitted its report on November 23, 2010, and on therecommendations of the committee, certain changes were brought in the bill. The revised bill was passed by both the Houses in 2012. The bill received the Presidential assent on June 7, 2012 and came into force on June 21,2012.[45] The government notified Copyright Rules, 2013 to accompany theact.

As discussed above, the Copyright Act, 1957 was amended significantly in the year 1994, to address the challenges posed by digitisationof works and the Internet, although partially. The Act was further amended in the year 1999, to comply with the obligations under the

[45] The bill was passed by the Rajya Sabha on May 17, 2012 and by the Lok Sabha on May22, 2012.

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TRIPS Agreement. The global community responded to the challenge posed to the copyright system by the Internet through two treaties framed in the year 1996, called WCT and WPPT, together known, as „Internet Treaties".[46] The treaties address the challenges relevant to the dissemination of protected material over digital networks such as the Internet.[47] Though India did not ratify the
„Internet Treaties" when the Copyright (Amendment) Act, 2012 was enforced but it harmonised the Copyright Act with the WCT and the WPPT. The amendments of 2012 go beyond the WCT and the WPPT and have introduced many progressive changes.

The following are the salient features of the Copyright Amendment Act, 2012:

- Inserted the definition of the term „commercial rental" under section2(fa) and conferred the right of commercial rental upon cinematograph film and sound recording under section 14(d)(ii) and 14(e)(ii)respectively. The same right is also conferred on broadcasting organisation under section 37(3)(e).

- Amended definition of „cinematograph films" under section 2(f) to include „any work of visual recording on any medium". Definition of
„visual recording" was inserted under section 2(xxa).

- Right to store work in any medium by electronic means conferred on literary works, artistic works, cinematograph films and sound recordings.

- Term of copyright protection in a photograph made at par with the artistic works i.e. until sixty years after the death of the author.

- Amended section 17 by virtue of which the authors of the literary, musical, dramatic and artistic works which have been incorporated in cinematograph film will continue to be considered as the first ownersof the work even after its incorporation.

- Amended section 18 which provides for assignment by inserting three provisos to safeguard the author of works from new modes of exploitation which were not

[46] S. Sivakumar and Lisa P. Lukose, "Copyright Amendment Act, 2012: A Revisit" 55(2) *JILI* 149 (2013).
[47] Zakir Thomas, "Overview of Changes to the Indian Copyright Law" 17 (4) *JIPR* 324 (2012).

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contemplated at the time of assignment. Further, the author of the literary or musical work included in a cinematograph film or sound recording will not assign or waive the right to receive royalties to be shared on an equal basis with theassignee of copyright for any utilisation of such work.

- Amended section 19 which relates to the mode of assignment. The assignment in any work is required to specify the amount of royalty and any other consideration payable.

- Amended section 21 which relates to the manner by which the author can relinquish his copyright. The author can relinquish all or any of therights in the copyright in the work by way of public notice.

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CHAPTER 3

FAIR USE: INTERNATIONAL AND INDIANPERSPECTIVES

3.1. The Berne Convention for the Protection of Literary and ArtisticWorks, 1886 (The Berne Convention)

The Berne Convention is the most significant copyright treaty in terms of history and geographic coverage. Its significance increased with its partial incorporation into the TRIPS and sanctions being imposed on the WTO members who are found not to be in compliance with Berne Convention. The Berne Convention saw the real encounter between developed and developing nations in relation to harmonising copyright law at international level.[48] The Berne Convention was revised various times by the Diplomatic Conference 1896 in Paris, the Diplomatic Conference of 1908 in Berlin, the Additional Protocol of 1914 in Berne, the Diplomatic Conference of 1928 in Rome, the Diplomatic Conference of 1948 in Brussels, the Diplomatic Conference of 1967 in Stockholm and the Diplomatic Conference of 1971 in Paris. The Preamble of the Berne Convention recognised the countries desire to "protect effectively and uniformly the rights of authors in their literary and artistic works." The Berne Convention is premised on three principles; the principleof national treatment, the principle of automatic protection, and the principle of independence of protection.

The Berne Convention laid down the minimum standards of protection to the literary and artistic works and provided the rights to be protected and theduration of protection. It protected literary and artistic works; however, it was left to the national legislation to prescribe the fixation requirement. The term of protection under the Convention is the life of the author and fifty yearsafter his death. In case of cinematographic works, the term of protectionshall expire fifty years after the work has been made available to the public and in case of photographic works and works of applied arts, the term shalllast at least until the end of a period of twenty-five years from the making of such work. It recognised various exclusive rights of the authors which include, the right to translate, the right to make adaptations and arrangementsof the work, the right to perform in public dramatic and musical works, the right to recite literary works in public, the right to communicate to the publicthe performance of works, the right to broadcast and the right of reproduction. It

[48] Rami M. Olwan, *Intellectual Property and Development: Theory and Practice* 43 (Springer,Berlin, 2013).

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also recognised moral rights; the right to claim authorship and the right to object to any mutilation, deformation or other modification of the work that would be prejudicial to the author‟s honour or reputation.

Since its very inception in1886, the Berne Convention has limitations and exceptions. Numa Droz, the Swiss President of the diplomatic conference which prepared and finally adopted the Convention in its original Berne Act, stated in the closing speech to the 1884 conference that:

Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion, by the „public interest‟. The ever growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities,which at the same time should not degenerate into abuses.

However, it is clarified at the outset that the Berne Convention does not use the words „exceptions‟ or „limitations‟. It does not even use the corresponding verb formats „to limit‟ and „to except‟. Wherever it allows free uses, it employs the verb „to permit‟ or the adjective „permissible‟ or more complex constructions, such as „to determine the conditions under which‟ an act „may‟ be carried out, or „to determine the regulations for‟ carrying out an act.

The Berne Convention in its original form contained only two very narrow limitations and exceptions, which were later amended. Firstly, a mandatory exception regarding articles published in newspapers and periodical under article 7 of the Berne Convention (in its original form). It provided that articles from newspaper and periodicals published in any of the countries of the Union may be reproduced in original or in translation in the other countries of the Union, unless the authors or publishers have expressly forbidden it. For periodicals, it shall be sufficient if the prohibition is indicated in general terms at the beginning of each number of the periodical. However, this prohibition cannot, in any case, apply to articles of political discussion or the reproduction of news of the day or miscellaneous information. Secondly, a voluntary exception for educational purposes under article 8 of the Berne Convention (in its original form). It provided the liberty of extracting portions from literary or artistic works for use in publications meant for educational or scientific purposes or chrestomathies.

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However, the system of limitations under the Convention then developed continuously. The limitations regarding mechanical recording were first introduced in 1908 through the Berlin Act, which revised the BerneConvention. Article 13 of the Berlin Act, 1908 provided that the authors of musical works shall have the exclusive right to authorise the adaptation of those works to instruments that can reproduce them mechanically and the public performance of the said works by means of these instruments. However, reservations and conditions may be determined by the domestic legislation and such reservations, and conditions shall be strictly limited to the country which has put them in force.

The Rome Act, 1928 under article 2^{bis} provided that the domestic legislation may exclude partially or wholly political speeches and speeches delivered in legal proceedings from the protection. The right to decide the conditions under the press may reproduce lectures, addresses, sermons and other works of the same nature is also reserved for the domestic legislation of each country of the Union. Further, article 11^{bis} provided that the authors of literary and artistic works shall enjoy the exclusive right of authorising the communication of their works to the public by radio-diffusion. However, the national legislations of the countries may regulate the conditions under which the right shall be exercised, but the effect of those conditions will be strictlylimited to the countries which have put them in force.

The Brussels Act, 1948 under article 9(2) provided that articles on current economic, political or religious topics may be reproduced by the press unless the reproduction thereof is expressly reserved. Article 10 provided that it shall be permissible to make short quotations from newspaper articles and periodicals, and to include them in press summaries. Further, it shall be a matter of legislation and special arrangements existing or concluded between the countries to provide the right to include excerpts from literary or artistic works in educational or scientific publications, or in chrestomathies, in so far its purpose justifies this inclusion. In addition to this, article 10^{bis} provided that it shall be a matter for legislation in countries of the Union to determine the conditions under which recording, reproduction, and public communication of short extracts from literary and artistic works may be made to report current events using photography or cinematography or by radio- diffusion.

The Stockholm Act, 1967 (the present text) provides under article 9(2):

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction

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does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Article 9(2) contains a test which is referred to as the „Three Step Test" and provides for limitations and exceptions to the right of reproduction:

- in certain special cases;
- that do not conflict with the normal commercial exploitation of thework; and
- that do not unreasonably prejudice the legitimate interests of theauthor.

All three conditions are to be read cumulatively and therefore have to be fulfilled, if a limitation or exception is considered admissible under the Convention. An example was taken into account in the General Report of the Stockholm Conference to explain the ambit of the provision:

> A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid, if a small number of copies is made,photocopying may be permitted without payment, for individual or scientific use.

It is important to analyse each step separately:

Certain Special Cases: In the Stockholm Conference, 1967, this first step wasseen as last step. It was deliberated that:

> If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special casesto introduce a

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compulsory licence, or to provide for use without payment.

Neither the text of the Convention nor the report of the main committee contains a precise definition on what cases may be regarded as „special". Sam Ricketson argued that „special cases" includes two aspects; first, the use in question must be for a quite specific purpose- a broad kind of exemption would not be justified and secondly, there must be something special about the purpose-it must be justified by some clear reason of public policy.[49] The Stockholm Study Group also suggested that exception to theright of reproduction be for clearly specified purposes.[53] The 2000 WTOPanel Report concerning section 110(5) of the USA Copyright Act relied uponthe definitions in the Oxford Dictionary of the term „certain"[54], „special"[55] and „case" and stated that:[50]

> …an exception or limitation in national legislation must be clearly defined. However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of exception is known and particularised. This guarantees a sufficient degree of legal certainty…an exception or limitation must be limited in its field of application or exceptional inits scope…should be narrow in quantitative as well as a qualitative sense…an exception or limitation should be opposite of a non-special, *i.e.*, a normal case…could be described in terms of beneficiaries of theexceptions, equipment used, types of works or by other factors.

In this context, open-ended exceptions such as fair use in the USA are always questioned on the ground that they are incompatible with the first step of the test. Therefore, a limitation or exception should be clearly defined and should have a defined scope.

Interference with Normal Commercial Exploitation: Paul Goldstein has suggested that the purpose of the second step is to fortify the author"s interestsin their accustomed markets against local legislative inroads.[51] An exceptionis not allowed if it covers any form of exploitation which has, or is likely to acquire considerable economic importance. If the

[49] Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* 482 (Kluwer, London, 1987).
[50] Certain means "known and particularised, but not explicitly identified", "determined, fixed, not variable; definitive, precise, exact". *The New Shorter Oxford English Dictionary* 364 (Oxford University Press, 1993), cited in WTO, "United States- Section 110(5) of the US Copyright Act: Report of the Panel" (June 15, 2000).
[51] Paul Goldstein, *International Copyright: Principles, Law, and Practice* 295 (OxfordUniversity Press, New York, 2001).

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exception is used to limit a commercially significant market or enter into competition with the copyright holder, the exception is prohibited. The 2000 WTO Panel Report concerning section 110(5) of the USA Copyright Act stated that it means "something less than full use of an exclusive right...if uses… enter into economic competition with the ways that right holders normally extract economic value from that right of the work and thereby deprive them of significant or tangible commercial gains."

Unreasonable Prejudice to Legitimate Interests of Rights Holder: It has been deliberated that the third step is the most difficult to interpret. To analyse the third step, it is important to understand the interpretation accorded to „unreasonable prejudice" and „legitimate interests". Legitimate can mean authorised by law or it can be used to denote something normal or regular. At the Stockholm Conference, 1967, the UK viewed that „legitimate" had the meaning „sanctioned by law". Other countries seemed to take a broader view of the term as meaning „supported by social norms and relevant public policies".[60] It has been argued that the interpretation might have been differentif the third step of the test had been formulated as „the reproduction not contrary to the legitimate interests of the author" and therefore „legitimate interests" are those protected by law. Further, the notion of interest is not limited to economic value. The word „unreasonable" indicates that some levelor degree of prejudice is justified but, when the prejudice level becomes unjustified, then there is a requirement to impose a compensation scheme. The inclusion of reasonableness criteria allows legislators to establish a balance between the rights of authors and other copyright holders, and the needs and interests of users. The question whether there is prejudice to the interest of the author and whether such prejudice is reasonable or not, leaves great latitude tonational legislations. The answer to the question posed by the Convention has to be given in two stages. Firstly, the national legislation that formulates the exception permitted by the convention, and in the second place, by the national courts interpreting the same as per the national law.[52] The 2000 WTOPanel Report concerning section 110(5) of the USA Copyright Act stated that it means "…how much the right holder is harmed by the effects of the exception…Before dealing with the question of what amount or which kind ofprejudice reaches a level beyond reasonable, we need to find a way to measureor quantify legitimate interests…prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the

[52] Stephen M. Stewart, *International Copyright and Neighbouring Rights* 122 (Butterworths,London, 1999).

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copyright owner."

Apart from article 9(2), there are other specific exceptions under the Berne Convention. Under article 2[bis](2) provides that it shall also be a matter for national legislation to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication when such use is justified by the informatory purpose. Under article 10(1), it is permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries. Article 10(2) provides that it shall be a matter for national legislation or for special arrangements between the countries to permit the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided that such is compatible with fair practice. It is made clear under article 10(3) that source and name of the author should be mentioned when the use is made for the purpose mentioned above.

Sam Ricketson,[53] in one of his study presented before the WIPO SCCR, pointed out that no quantitative limitations are contained in article 10(2). He specifically stated that:

> Article 10(2) does not contain any restriction on the number of copies that may be made in the case of publications and sound or visual recordings that are made for teaching purposes…The only further qualification applied here is that the making of multiple copies must becompatible with fair practice. Obviously, if this competes with the author"s normal exploitation of his work and unreasonably prejudices his legitimate interest, article 10(2) should not apply. In this regard, theamount copied will also be a highly relevant factor, particularly where large numbers of copies are made for individual classroom use by students. Remuneration for such uses under a compulsory licence may therefore make the use more compatible with fair practice.

Article 10[bis](1) provides that it shall be a matter for national legislation to permit the reproduction by the press, the broadcasting or the communicationto the public by wire of

[53] Sam Ricketson, "WIPO Study on Limitations and Exceptions of Copyright and RelatedRights in the Digital Environment"

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articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or suchcommunication thereof is not expressly reserved. However, the source must always be clearly indicated and the legal consequences of a breach of this ere protection is claimed. Further, as per article 10^{bis}(2), it shall be a matter of national legislation to determine the conditions under which, for the purposeof reporting current events using photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heardin the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

Article 11^{bis} (3) prescribes a limitation on the exclusive right of communication to the public by broadcasting or cable. It provides that it shall be a matter for national legislation to determine regulations for ephemeral recordings made by a broadcasting organisation by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorised by such legislation.

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CHAPTER 4

FAIR USE FOR LITERARY PURPOSES: ACOMPARATIVE STUDY

4.1 INTRODUCTION

Copyright and education have a troubled history together.[54] The impact of copyright law on educational establishments was always a matter of debate and has gained momentum in recent years with even the deliberations and discussions going on at the international level, as discussed in Chapter 3 of thethesis. The never ending tussle between the copyright owners and the users of the copyrighted works has reached a new height with the technological advances in making copies of the copyrighted works, initially with the invention of the photocopying machines or reprography technology and further with the availability of technology for creating a scanned copy and circulating it online.

The copyright owners and more specifically the publishers have become more militant, to protect their rights under the copyright law against the blatant and widespread unauthorised copying taking place within the premises of the educational institutions. The publishers have taken a firm stand against the unauthorised reproduction of works in educational institutions as they believe that this may drive them out of business. On the other hand, educational institutions want the advantage of making copies of the copyrighted works with ease to meet the requirements and expectations of their students. The teachers and educators also want the freedom to make multiple copies of the copyrighted works for distributing the same to the students in the classroom, and this lies at the heart of recent controversies.

The doctrine of fair use is a significant concept in copyright law as it seeks to balance the societal interest as opposed to the personal interest of the owners of the copyright. However, despite its importance in copyright law, theconcept remains relatively unexplored in India in general and particularly in the educational context. There is a scarcity of case laws on educational exceptions in India, and the lack of any solid judicial pronouncement creates problems for the educators. On the other hand, in other countries, specifically in the USA, the concept of fair use has been refined over the past decades through various judicial pronouncements and by formulating guidelines, with regard to fair use for educational

[54] L. Ashley Aull, "The Costs of Privilege: Defining Price in the Market for Educational Copyright Use" 9 *Minn. J. L. Sci. & Tech.* 573 (2008).

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purposes. Therefore, it is essential to do a comparative study.

In this context, the focus of this chapter will be on analysing the fair use provisions for educational purposes in the USA, UK, Australia, Germany and Canada. Further, based on the comparative study, this chapter highlights the best practices that India can learn from the countries under study.

4.2 COMPARATIVE STUDY

Under this part, the statutory provisions and the judicial pronouncements on fair use for educational purposes of the countries under study will be analysed. The term „educational purposes" shall include the uses of copyrighted works for private or personal use; use for research or educational reproduction in the course of instruction; educational publications or compilations; performances in and by educational institutions; making and using of copies of broadcast for education ; use for the benefit of disabled; anduse by libraries.

4.2.A United States of America

The basis of the doctrine of fair use is found in article 1, section 8, clause 8, of the United States Constitution. It empowers the congress to make laws to promote the progress of science and arts by conferring exclusive rightson the creators for their writings. The earliest case that recognised the fair use doctrine in the USA was *Folsom* v. *Marsh.*[55] It is termed as the „source of thefair use doctrine" in the USA. Story J. observed that:

> We must often, in deciding questions of this sort, look to the natureand objects of the selections made, the quantity and value of thematerials used, and the degree in which the use made may prejudicethe sale, or diminish the profits, or supersede the object of the original work. Many mixed ingredients enter into the discussion of such questions.

This decision formed the basis of the subsequent judicial decision in *Karll* v. *Curtis*

[55] 9 F Cas 342 (1841).

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Publishing Co.,[56] *Leon* v. *Pacific Tel. & Tel. Co.*,[57] and *Benny* v. *Loew's Inc.*[58] The doctrine of fair use became firmly entrenched in copyright law in the USA through judicial decisions. However, the Copyright LawRevision Bill, 1967, proposed statutory recognition to the doctrine of fair use and the factors for determining fair use and, in 1976, fair use was given statutory recognition.

The doctrine of fair use is codified in section 107 of the Title 17, US Code. Section 107 provides that notwithstanding anything contained in section106[8] and 106A, [9] the fair use of a copyrighted work is not an infringement, including use by reproduction or by any other means, for purposes such as criticism, comment, teaching including multiple copies for classroom use, scholarship or research. Following factors need to be considered while determining fair use:

- the purpose and character of the use, including whether such use is of acommercial nature or is for non-profit educational purposes;

- the nature of the copyrighted work;

- the amount and substantiality of the portion used in relation to thecopyrighted work as a whole; and

- the effect of the use upon the potential market for or value of the copyrighted work. .

There are certain situations expressly stated in the section. It incorporates educational purposes like teaching (including multiple copies for classroom use), scholarship and research. However, use for educational purpose alone does not make it fair use, and such use will be assessed on the premise of the fair use factors mentioned in the provision.

For determining the purpose and character of the use, the courts usually consider whether the use was productive, commercial nature of the use and the conduct of the alleged

[56] 39 F.2d 532 (1956).
[57] 39 F. Supp. 836 (1941).
[58] 91 F.2d 484 (1937).

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infringer.[59] However, none of the factor is determinative of a finding. The courts have focused on the transformative use of the works.[60] In *Harper and Row Publishers Inc.* v. *Nation Enterprises,*[61] theUS Supreme Court observed that, "the crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."

The profit element is a significant factor in assessing fair use; however,it is not the sole factor and largely it will depend on the totality of all the factors. In *Sony Corp.* v. *Universal City Studio,*[62] it was observed that. "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." However, this observation was rejected in *Campbell* v. *Acuff-Rose Music Inc.*[63]

For assessing the nature of the copyrighted work copied, courts usuallyassess whether the work is creative or informational. Usually, the scope of fair use is more when informational work is involved as opposed to creativeworks.[64] In *Harper and Row Publishers Inc.* v. *Nation Enterprises,*[65] the court observed that, "the law generally recognises a greater need to disseminate factual works than works of fiction or fantasy." The courts also considers whether the work is imaginative and original, or whether the creator invested substantial time and labour made in anticipation of a financial return.[17] The courts while distinguishing between functional or factual work look into the expressive elements of the work.[18] Further, if the work is unpublished, and the alleged infringing work is published, then the scope of fair use defence is narrowed.

For assessing the amount and substantiality of the portion used in relation to the copyrighted work, the courts rely upon the "the quantity and value of the materials used." Therefore, the court must evaluate both qualitative as well as the quantitative aspects of the work copied.[66]

[59] *Rubin* v. *Brooks Cole Pub, Co.*, 836 F. Supp. 909 (1993).
[60] *Basic Books, Inc.* v. *Kinko's Graphics Corp.*, 758 F. Supp. 1522 (1991).
[61] 471 U.S. 539, 550 (1985).
[62] 464 U.S. 417, 451 (1984).
[63] 510 U.S. 569, 584 (1994).
[64] *Hustler Magazine, Inc.* v. *Moral Majority*, 606 F. Supp. 1526 (1985).
[65] *Sega Enters. Ltd.* v. *Accolade, Inc.*, 977 F. 2d 1510 (1992).
[66] *New Era Publications* v. *Carol Publishing Group*, 729 F. Supp. 992, 999 (1990).

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In *Harper and Row Publishers Inc.* v. *Nation Enterprises*,[67] it was observed that, "…taking may not be excused merely because it is insubstantial with respect to the infringing work."

The amount used should be reasonable in relation to the purpose of thecopying. Generally, the greater the amount of the work used, less likely it is that the fair use exception is applicable. The courts have clarified that even the copying of an entire work does not preclude fair use, but it does weigh against a finding of fair use. On qualitative analysis, the courts have clarifiedthe use of a small portion of the work that is the most essential or important part of the work is unlikely to be considered a fair use. The court must take into account how much of the copyrighted work was taken and whether thatportion was an essential element of the plaintiff"s work.

For assessing the effect of use on the market, the court evaluates the extent of harm caused to the market by the alleged use and whether the use by the alleged infringer would adversely impact the potential market for the original. Therefore, if the alleged infringing work competes with the original work then it is unlikely to be considered a fair use. While assessing this factor,the courts make an attempt to balance the interest of the public and the copyright proprietor"s interest.[68] The market analysis should consider not onlythe market for original work but also the market for derivative works.

However, the four statutory factors are not meant to be exclusive, although they are highly probative of whether the allegedly infringing use is fair. In addition to the four factors so enumerated, courts generally take into consideration whether: the party using the protected work acted in good faith; the party using the work asked for permission; and the age and availability of the underlying work.[69]

Further, section 108(a) provides that it is not an infringement of copyright for a library or archives or any of its employees acting within the scope of their employment to reproduce one copy or phonorecord of a work orto distribute such copy or phonorecord if the reproduction or distribution is made without any purpose of direct or indirect commercial advantage; the collections of the library or archives are open to the public or available notonly to researchers affiliated with the library or archives or with the institution of which

[67] *Association of American Medical College* v. *Mikaelian,* 571 F. Supp. 144 (1983), *Walt Disney Productions* v. *Air Pirates,* 581 F. 2d 751 (1978) and *Rosemont Enterprises*, *Inc.* v. *Random House, Inc.,* 366 F. 2d 303 (1966).
[68] *MCA, Inc.* v. *Wilson,* 677 F. 2d 180 (1981).
[69] *NXIVM Corp.* v. *Ross Inst.*, 364 F.3d 471 (2004).

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it is a part, but also to other persons doing research in a specialised field and the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord.

Further, section 108(b) provides that the rights of reproduction and distribution apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security and for deposit for research use in another library or archives if the copy or phonorecord reproduced is currently in the collections of the library or archives and such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.

Further, section 108(c) provides that the right of reproduction underthis section applies to three copies or phonorecords of a published workduplicated solely for the purpose of replacement of a copy or phonorecord thatis damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtainedat a fair price; and any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premisesof the library or archives in lawful possession of such copy.

Section 108(d) provides that the right of reproduction and distribution apply to a copy made from the collection of a library or archives where theuser makes his or her request or from that of another library or archives of no more than one article or other contribution to a copyrighted collection or periodical issue or to a copy or phonorecord of a small part of any other copyrighted work if the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research and the library or archives displays prominently at the place where orders are accepted and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribeby regulation.

Section 108(e) provides that the rights of reproduction and distribution apply to the entire work or to a substantial part of it, made from the collection of a library or archives where

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the user makes his or her request or from that of another library or archives if it has been determined on a reasonable investigation by the library or archives that a copy or phonorecord cannot be obtained at a fair price if the copy or phonorecord becomes the property of the user and the library or archives had no notice that it will be used for any purpose other than private study, scholarship or research and the library or archives displays prominently at the place where orders are accepted, and includes on its order form a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

Section 108(f) clarifies that nothing in this section shall be construed toimpose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises only if such equipment displays a notice that the making of a copy may be subject to the copyright law. Further it provides that nothing in this section affects the right of fair use as provided by section 107.

Further section 108(g) clarifies that the rights of reproduction anddistribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the samematerial in separate occasions but do not extend to cases where the library or archives or its employee is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or engages in the systematic reproduction or distribution of single or multiple copies.

Section 108(h)(1) permits a library, archives including a non-profit educational institution to reproduce, distribute, display or perform in facsimile or digital form a copy or phonorecord during the last 20 years of any term of copyright of a published work for purposes of preservation, scholarship, or research if the library or archives has determined that the work is not subject to normal commercial exploitation, a copy or phonorecord of the work cannot be obtained at a reasonable price or the copyright owner or its agent did notprovide any notice.

Section 110(1) permits performance or display of a work by instructorsor pupils in the course of face-to-face teaching activities of a non-profit educational institution in a classroom or similar place devoted to instruction, unless in the case of a motion picture or other audiovisual work, the performance or the display of individual images is given by

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means of a copy that was not lawfully made under this title, and the person responsible for the performance knew or had reason to believe that the same was not lawfully made. Section 110(2) permits the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session by or in the course of a transmission if the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited non profit educational institution; the performance or display is directly related and of material assistance to the teaching content of the transmission and the transmission is made solely and tothe extent technologically feasible, the reception of such transmission is limited to students officially enrolled in the course and the transmitting bodyor institution institutes policies regarding copyright and in the case of digital transmission applies technological measures. Section 110(8) permits performance of a nondramatic literary work, by or in the course of transmission specifically designed for blind or other handicapped persons who are unable to read normal printed material or deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission of visual signals if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of a governmental body or a non-commercial educational broadcast station or a radio subcarrier authorization or a cable system.

Section 121(a) permits the authorized entity to reproduce or to distribute copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation if such copies or phonorecords are reproduced or distributed in accessible formats exclusively for use by eligible persons. Section 121(2) defines authorized entity as a non-profit organisation or a governmental agency that has a primary mission to provide specialised services relating to training, education or adaptive reading or information access needs of blind or other persons with disabilities. Section 121(3) defines eligible person as an individual who, regardless of any other disability is blind; has a visual impairment or perceptual or reading disability that cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability or is otherwise unable, through physical disability to hold or manipulate a book or to focus or move the eyes to the

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extent that would be normally acceptable for reading.

According to section 121(b)(1), the copies or phonorecords shall not bereproduced or distributed in a format other than accessible format exclusively for use by eligible persons, bear a notice that any further reproduction or distribution in a format other than an accessible format is an infringement and include a copyright notice identifying the copyright owner and the date of the original publication. As per section 121(d)(1), accessible format means an alternative manner or form that gives an eligible person access to the work when the copy or phonorecord in accessible format is used exclusively by the eligible person to permit him or her to have access as feasibly and comfortablyas a person without such disability.

Before, discussing the judicial pronouncements, it is important to discuss various guidelines which formed the core of the disputes in various cases. The early fair use guidelines though, did not embody workable standards, but the further guidelines were developed premised on it. Theearliest fair use guideline was the Gentlemen"s Agreement, 1935 which has been recognised as one of the most important landmark in the history of thefair use privilege and was a product of long deliberations that started back in the year 1929. Kenneth Crews, calls this agreement as "one of the first attempts to interpret fair use for education" and noted that it "remained the only major copying standard for almost a quarter of a century."[70]

The agreement allowed library, archives, museum or similar institutions to make single photographic copies of a part of a copyrighted work; however, these copies were not supposed to substitute the purchase of the original work and were meant only to facilitate research. This agreement was a model of consensual voluntary guidelines agreed to by copyright ownersand users to identify the limits of fair use in many cases.

In *Williams & Wilkins Co.* v. *United States,*[71] the publisher of medical journals brought suit against the National Institutes of Health and National Library of Medicine for making a photocopy of journal articles and distributing them to researchers. The commissioner held that the copying was beyond the scope of fair use; however, on appeal, the decision was reversed.In a review sought by the publisher before the US Supreme Court, the decisionof

[70] Kenneth Crews, *Copyright, Fair Use, and The Challenge For Universities: Promoting theProgress of Higher Education* 30-31(University of Chicago Press, Chicago, USA, 1993).
[71] 487 F. 2d 1345 (1973).

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the appellate panel was upheld that the copying in question was fair. This particular case is of considerable importance and had an effect on the revision of the copyright law in the year 1976.

The 1976 revision of the copyright law gave statutory recognition to the doctrine of fair use. However, there was uncertainty surrounding the new provisions. Consequently, representatives of educators, authors and publishers negotiated an understanding of the new law and best known of all the fair use guidelines emerged, the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions. These guidelines permitted:

- Making of single copies by or for a teacher of a chapter from a book, an article from a periodical or newspaper, a short story, short essay or short poem, a chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

- Making of multiple copies for distribution by or for a teacher (single copy per student) subject to the tests of brevity, spontaneity and cumulative effect[41] and copies must include a notice of copyright.

However, these permissible uses were subject to:

- Copying shall not be used to create or replace or substitute for anthologies, compilations or collective works.

- No copying from works intended to be consumable in thecourse of study or of teaching.

- Students cannot be charged beyond the actual cost of thephotocopying.

- Copying shall not substitute for the purchase of books or berepeated with respect to the same item from term to term.

Apart from the Classroom Guidelines, other guidelines also emerged, like Music Guidelines, 1976, which addressed the copying of music for instructional purpose and the Off-Air Videotaping Guidelines, 1981, which permitted a teacher to record a broadcast for

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later use in classroom teaching.

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CHAPTER 5

CONCLUSION AND SUGGESTIONS

5.1. CONCLUSION

IPRs are property rights granting a limited monopoly on the creations of the mind. It confers exclusive rights on the creators of the works to benefit from their creations and exclude others from using their creations. Copyright is one of the branches of IPR that confers bundle of rights on the creators of original work of authorship for a fixed period. Copyright provides incentives to the creators to contribute to the store of knowledge. The foundation of the copyright law is premised on unjust enrichment theory, labour theory, personality theory, utilitarian theory, economic theory and distributive justice theory. Each country‟s copyright law is based on all these theories, although a country‟s copyright law may be inclined more towards one theory. It is now accepted that most of the countries‟ copyright system is based primarily on utilitarian theory as its objectives are to encourage the creation and dissemination of works and maintain the delicate balance between the rights of owners and users.

To balance the interests of the creators and the users, the rights conferred under the copyright law have never been absolute and have been subjected to certain limitations. One such limitation has been fair use which permits use of the copyrighted works without the consent of the creator and without paying any remuneration. There is no uniformity in the terms used to describe the actspermitted without the permission of the creator, and the terms like fair use, fair dealing, permitted acts, exceptions, limitations and acts not amounting to infringement are used in the legislations of the various countries. Due to this reason, there is no clarity regarding the definition of the term fair use. In academic works, fair use is described as a „liberty right‟; „exemption‟; „privilege in others‟; „excused infringement‟; „defence‟ and „limitation on monopoly‟. However, the common thread in all the definitions is that:

- fair use permits use of a reasonable portion of a work;

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- the work shall be used for a legitimate purpose or use which is legally permissible;
- use of the work is without the permission of the right holder and withoutpaying equitable remuneration to the right holder.

Due to the lack of definition, fair use is considered as a situation-specific and case-specific doctrine.

Fair use provisions under the copyright law are of constitutional significance as the use of copyrighted material is significant for exercising freedom of expression. Also, the creators should not be allowed to interfere with the use of copyrighted works for private use. Another critical consideration for having fair use provisions under the copyright law is to promote the disseminationof knowledge and information. This has been achieved through specific copyright exceptions for educational institutions and libraries and thereby realizing the right to education. Further fair use provisions are required to regulate industry practice like press reviews and overcome the transaction costs linked with the negotiation of licenses between the right owners and users.

It is established that fair use and copyright are two sides of a coin that cannot exist without each other as the ends of copyright law can be achieved only through fair use doctrine. It is rightly stated that, "…fair use…is a wise synthesis of conflicting rights which, while safeguarding the author, avoids injury to the progress of ideas which would flow from an undue manacling of others in the reasonable use of copyrighted materials."[72]

At the international level, the Berne Convention, since its inception in the year 1886, contained copyright exceptions. However, it had only two narrow exceptions in its original form, firstly, a mandatory exception regarding articles published in newspaper and periodicals and secondly, a voluntary exception permitting extraction of portions

[72] Leon R. Yankwich, "What is Fair Use?" 22(1) *U. Chi. L. Rev.* 203, 215 (1954-1955).

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from literary works for use in publications for educational purposes. Other exceptions were added in the convention from time totime through various revisions. The revision of the convention by the Stockholm Act, 1967 prescribed the three-step test under article 9(2). It permits the reproduction of work for specific purposes if such reproduction does not conflict with the normal commercial exploitation of the copyrighted works and does not unreasonably prejudice author‟s legitimate interests. This three step test is also incorporated in article 13 of the TRIPS Agreement, and it covers all economic rights except for related rights unlike, the Berne Convention, which covers only the right of reproduction. The WCT and the WPPT also prescribe this test and permit the countries to devise new exceptions and extend the existing exceptions to the digital environment. The Marrakesh Treaty permits the countries to have exceptions to facilitate the availability of works in accessible format for persons with disability. It is the first international instrument that focuses on users‟ rights instead of authors‟ rights.

The international legal framework reflects that the international instruments on copyright and related rights have long contained the provisions related to copyright exceptions; however, the international instruments provide useful but insufficient guidance for national or regional policy makers.[73] Therefore, copyright exceptions are still a matter of deliberations and discussions at the international level. The WIPO SCCR is engaged in continuous deliberationson this area to bring forth more clarity and certainty. One of the main concerns highlighted before the WIPO SCCR is that there is no uniformity in exceptionsfor educational institutions and libraries. The member states have proposed elaborate discussions and have fully supported the idea of cooperation in this area.

Further, two treaties were proposed by few international organisations along with WIPO member states. The draft A2K Treaty specifically recognised that copyright exceptions for educational institutions, libraries and persons with disabilities could protect and enhance access to knowledge. The Treaty Proposal on Copyright Limitations and

[73] Daniel Gervais, “Fair Use, Fair Dealing, Fair Principles: Efforts to Conceptualize Exceptions and Limitations to Copyright” 57 *J. Copyright Soc’y USA* 499, 520 (2009-2010).

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Exceptions for Libraries and Archives recognised the need for a global approach to copyright exceptions and a minimum level of international harmonisation. In addition to these attempts made at international level to bring certainty and uniformity in the area of copyright exceptions, the academic works on this area have proposed a multilateral treaty specifically on copyright exceptions that should be flexible, be judicially manageable and should leave ample space for national autonomy.

In India, sections 52 and 39 of the Copyright Act, 1957 provide the list of the permitted acts which will not amount to infringement of copyright and broadcasting reproduction rights and performer‟s rights, respectively. The permitted acts under these sections fulfil the three-step test incorporated in the international instruments. The Copyright (Amendment) Act, 2012 brought notableamendments in section 52 for facilitating better access to works. The amendment extended fair dealing provision under section 52(1)(a) to sound recordings and cinematograph films. Further, it also considered the technological needs and requirements and introduced provisions relating to transient and incidental storage of works as copyright exceptions. Specifically, section 52(1)(zb) carving outcopyright exception for the persons with disability is the most progressive change brought by the amendment.

The courts in India have accepted that it is not possible to delineate the contours of fair dealing, and it depends majorly upon the facts of the case. The courts have relied upon various factors like purpose of use, quantitative andqualitative aspects of the work used, transformative nature of the work and effect of the use on the market, and to some extent public interest. Also, there are certaincopyright exceptions under sections 52 and 39, the scope and operations of which are still not clear.

The use of copyrighted works is essential for teaching, private study and research, and it is possible only through fair use provisions. The fair use provisions related to educational institutions and libraries have been a matter of discussions and deliberations at the international level as well as in various countries, including India. Therefore, the

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researcher opted for a comparativestudy, and based on it, it can be concluded that there are differences in the fair useprovisions of the countries under study and India can learn from the best practicesfollowed by countries under study.

Further, photocopying of copyrighted works by educational institutions raised serious copyright concerns. This issue was even deliberated at the international level. It was recommended that the states can establish whatever is best suited for them after giving due consideration to their educational, cultural and socio-economic development and in case of widespread reprography, states can consider establishment of collective administration system. The countriesunder study adopted the suggestion of collective administration system and RROswere established; however, there are differences in the legal regime regulating RROs. The functioning of the RROs has been questioned in all these countries, specifically in relation to fixation of tariffs and collection and distribution of tariffs.

Through this research, the researcher could achieve the objectives of undertaking this study. The researcher has explained the concept of copyright and fair use under chapter 2 of the thesis. Further, the researcher has traced theevolution of the fair use provisions at the international level and has in detail analysed the international instruments on copyright and the discussions and deliberations of the WIPO SCCR under chapter 3 of the thesis. The researcher hasanalysed the interpretation accorded to sections 52 and 39 of the Indian CopyrightAct, 1957 with the help of scholarly works and judicial pronouncements and has also critically examined the amendments brought to these section in the year 2012under chapter 3 of the thesis. The researcher undertook a comparative study and has suggested certain amendments in the Indian copyright law to bring more clarity and certainty in the copyright exceptions under chapter 4. The researcher has examined how the problem of photocopying of copyrighted works was addressed at the international level and in the countries under study and has specifically studied the working of the IRRO and has suggested changes to be brought in the functioning of the IRRO under chapter 5 of the thesis.

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5.2. FINDINGS

The following findings are drawn from the present study, which proves thehypothesis of the thesis.

- The copyright law of all the countries recognises the doctrine of fair use, but the copyright statutes do not define or explain the contours of the doctrine. It is established that it is impossible to define fair use, and it has been regarded as case-specific doctrine.

- The doctrine of fair use protects freedom of expression by permitting use of copyrighted works for research, private study, criticism, review and reporting of current events.

- The doctrine of fair use permits private use of copyrighted works to facilitate development of the personality of an individual and to ensurethat an individual can participate fully in the intellectual and cultural life.

- The doctrine of fair use encourages the dissemination of knowledge and protects the right to education by permitting educational institutions and libraries to use copyrighted works.

- The doctrine of fair use addresses the high transaction cost attached with the negotiation of licenses between the right holders and the users.

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