

**CAN USER RIGHTS UNDER SECTION 52 OF THE INDIAN COPYRIGHT ACT BE
CONTRACTUALLY WAIVED?**

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ABSTRACT

The note comments on the enforceability of contracts restricting user rights under the Indian Copyright Act, 1957. This topic has not received adequate attention due to our still emerging fair use doctrine and lack of litigation in this regard. This paper gleans the Indian position by analysis of constitutional principles, public policy and case law regarding unfairness in adhesion contracts (where terms and conditions are set by one of the parties, and the other party/parties has little or no ability to negotiate more favourable terms on account of being in a "take it or leave it" position). The note discusses the enforceability of contractual waivers of user rights by delving into the purposes of free speech, copyright and the exceptions to it. It analyses the chilling effects of enforceability of such waivers on free speech in causing a doctrinal creep in the already nascent fair use doctrine in India. It argues that the Indian Copyright Act, 1957 and the cases concerning fair use so far have laid down that the exceptions under Section 52 are not mere excuses for infringement but user rights whose full exercise is a public policy goal. Based on case law on waiver of statutory benefits in India and comparative legal positions in the European Union, U.K., the U.S and Canada, the note concludes that user rights under copyright law are statutory rights based on public interest that cannot be contractually waived off like fundamental rights themselves.

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I. INTRODUCTION

Copyright schemes usually endeavour to internally balance the interest of the author in remuneration for her creative effort with that of the public in increasing access to and availability of the author’s intellectual and artistic creation by imposing an artificially created market on all participants.¹ Within the realm of this legal monopoly, contracts can help in the achievement of copyright aims through licensing of protected materials, allowing authors to make economic profits through private negotiation of prices.² Contractual rights are generally believed to be unaffected by provisions of copyright law.³ However, this note will argue that S.52 of the Indian Copyright Act, 1957 (“the Act”) renders the contractual waiver of user rights, usually through standard form contracts, unenforceable as it contravenes the legislative intent of the Section, the right to free speech (Article 19(1)(a), Indian Constitution) and thereby public policy as per S.23 of the Indian Contract Act, 1872.⁴

In the 1970s, Prof. Nimmer had aptly foreseen that courts will need to "*delineate the respective claims of copyright and freedom of speech.*"⁵ As per the U.S. Supreme Court (SC), the right to free speech furthers creation of a free marketplace of ideas,⁶ enhances political participation, stabilises society by channelling potentially disruptive energy into meaningful

¹ Ramona Paetzold, ‘Contracts Enlarging A Copyright Owner's Rights: A Framework For Determining Unenforceability’ [1989] NLR 817.

² Goldstein, ‘Pre-empted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright’ [1977] UCLALR 113.

³ Brown, ‘UnifTcatio. A Cheerful Requiem for Common Law Copyright’ [1977] UCLALR 1070.

⁴ What consideration and objects are lawful, and what not. — The consideration or object of an agreement is lawful, unless—it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void

⁵ Nimmer, ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’ [1970] UCLALR 1180.

⁶ *Red Lion Broadcasting Co. v. FCC* [1969] 395 US 367 [390].

public discourse⁷ and allows citizens to make informed decisions within democratic processes.⁸ As per Justice Brandeis, free speech is an end in itself,⁹ as restrictions to speech or information impede us from developing our faculties to their fullest potential.¹⁰

Similarly, S.52 of the Indian Copyright Act provides the users of copyright with certain rights not amounting to infringement. The legislative intent behind this section is to facilitate cultural activity, business transactions, improve education, make law more accessible and permit persons with disabilities to access copyrighted content.¹¹ It seeks to offset the monopoly of a copyright holder against public interest by increasing accessibility in a manner that does not conflict substantially with the holder's moral rights or commercial profit.¹² Part of the purpose of the fair dealing provisions¹³ and exceptions under S.52 of the Act is to realise the right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India, which as per case law includes the community right of accessing information,¹⁴ the individual right of being informed,¹⁵ as well as the social good of an engaged public.¹⁶ Barriers to the exercise of this right are not confined to direct and affirmative state action such as outright censorship. They include resource inequalities impeding free speech upheld by State regulation of property rights through laws such as copyright law in the immediate case.¹⁷ Thus, S.52 must be interpreted and enforced in harmony with constitutional principles to avoid the impediments to a full exercise of the freedom guaranteed under Art.19(1)(a) of the Constitution of India. This will keep the Act from intolerable rigidity, internally balance user as well as owner rights

⁷ *Whitney v. California* [1927] 274 US 357 [375] (Brandeis J).

⁸ Meiklejohn, 'The First Amendment Is an Absolute' [1961] SUP CT REV 245.

⁹ *Supra* Note 8.

¹⁰ Emerson, 'Toward a General Theory of the First Amendment' [1966] YLJ 877.

¹¹ Lok Sabha Debates, 22 May 2012, available at: <https://www.youtube.com/watch?v=qCLB0Gz675I&feature=related>, last accessed 25 September 2018.

¹² Arpad Bogoch, "WIPO - Guide to the Berne Convention" [1978] ¶ 9.6 to 9.13.

¹³ Fair dealing is an exception to copyright infringement laid out in the copyright statutes of common law jurisdictions such as Great Britain, Canada, Australia and New Zealand.

¹⁴ *Tata Press Ltd. v Mahanagar Telephone Nigam Ltd.* [1995] 5 SCC 139; *Sect, Ministry of Information and Broadcasting v. Cricket Association Bengal* [1995] 2 SCC 161.

¹⁵ *Union of India v. Association for Democratic Reforms* [2002] 5 SCC 294; *PUCL v. UoI* [2003] 4 SCC 399; *Indian Express v. UoI* [1985] 1 SCC 641.

¹⁶ Justice Iyer, *Law, Freedom and Change* (East West Press Pvt. Ltd., New Delhi, 1975) 68; *Sakal Papers Pvt. Limited v UoI* [1962] 3 SCR 842.

¹⁷ Gautam Bhatia, 'Copyright and Free Speech – I' (Indconlawphil, 7 Oct 2013), available at: <https://indconlawphil.wordpress.com/2013/10/07/copyright-and-free-speech-i-constitutional-arguments-against-oup-et-al-in-the-delhi-university-photocopying-lawsuit/>, last accessed 20 January 2018.

and preclude the violation of public policy, especially as the Indian Copyright Act was enacted in 1957 prior to the extensive development of Art.19(1)(a) jurisprudence.¹⁸

For enforcing a contractual waiver of user rights, it is to be determined *firstly*, that the contract is not unconscionable due to contravention of Section 23 (violation of public policy) or Section 28 (restraint on legal proceedings) of the Indian Contract Act or Article 19 of the Constitution of India, and *secondly*, that the waiver of the rights is *voluntary* and does not demonstrate a stark inequality in bargaining power through its standard form. Part I of this essay discusses how fair use reconciles and negotiates between the aims of copyright and free speech whenever they are seemingly in conflict with each other. It also discusses the Indian standard of fair dealing as per statutory and case law. Part II argues that Indian courts have read Section 52 as a provision conferring user rights and interpreted the same liberally. Part III analyses the ramifications of such reading upon the enforceability of contractual waiver of rights premised on public policy such as user rights. Part IV concludes in light of recent landmark decisions that user rights cannot be contractually waived as such contracts would be unenforceable for contravention of public policy.

II. FAIR USE: MEDIATING BETWEEN COPYRIGHT AND FREE SPEECH

This part helps analyse the purpose of fair use within the Indian copyright regime which thereby allows us to define its scope and subsequently determine the enforceability of its waiver in India. The rationale for fair use is the same as that of free speech for it allows free dissemination of information, criticism, comment, research, etc.¹⁹ Justice Ginsburg famously referred to fair use as a free speech safeguard.²⁰ Justice Endlaw, referring to a journal article²¹ also brought into perspective the similarity of the purpose of both free speech and copyright law by reasoning that the latter “*is designed to stimulate activity and progress in the arts for the intellectual enrichment of the public*” and “*intended to increase and not impede the harvest of knowledge, motivate the creative activity of authors and inventors in order to benefit the*

¹⁸ Gautam Bhatia, ‘Copyright and Free Speech – I’ (Indconlawphil, 7 Oct 2013), available at: <https://indconlawphil.wordpress.com/2013/10/07/copyright-and-free-speech-i-constitutional-arguments-against-oup-et-al-in-the-delhi-university-photocopying-lawsuit/>, last accessed 20 January 2018.

¹⁹ *Meeropol v. Nizer* 505 F.2d 232 (2d Cir. 1974).

²⁰ University of Michigan Library, ‘Five things you should know about ‘fair use’ (20 February 2017), available at: <https://record.umich.edu/articles/five-things-you-should-know-about-fair-use>, last accessed 20 January 2018.

²¹ Basheer, Khettry, Nandy, Mitra, ‘Exhausting Copyrights and Promoting Access to Education: An Empirical Take’ [2012] JIPR 335.

public.”²² Thus, reward for the author’s creativity is recognised as the means to general public welfare.²³ Once we acknowledge the sameness of aims of both copyright and free speech, we can resolve conflicts by ascertaining on a case-to-case basis which of the two serves the ultimate purpose of public interest.

The single Judge Bench of the Delhi High Court in the case of *ICC Development (International) Ltd & Anr v. New Delhi Television Ltd.*²⁴ had observed that it is both impossible and inadvisable to exactly define the ambit of fair dealing, reaffirming the Division Bench’s observations in the case of *ESPN Star Sports v Global Broadcast News Ltd. & Ors.*²⁵ The Court held that a determination of fair dealing with the work would occur based on particular facts on a case-to-case basis, for instance, “*the length of use, context in and the purpose for which the work is used and the intention behind such use, whether it is by way of a bonafide reporting of the current news and its review or it is aimed at commercial exploitation of the work so as to gain unfair advantage for the broadcaster*” and no straitjacket formula could be laid down in that regard.²⁶

Contrary to the initial single Judge decision, J. Nandrajog on the Division Bench in the landmark *Rameshwari Photocopy case*²⁷ clarified that the “*fair dealing*” standard was expressly prescribed only in S.52(1)(a).²⁸ Fair use tests as developed in jurisdictions abroad (especially the U.S.A) apply to S.52(1)(a) as per the Division Bench of the Delhi High Court in *D.B. India TV Independent News Service Pvt. Ltd. & Ors. v. Yashraj Films Pvt. Ltd.*²⁹ As per J. Nandrajog in the *Rameshwari Photocopy* case, these tests cannot be imported into the other sub-sections of S.52(1), including S.52(1)(i).³⁰ The sub-sections under S.52 contain exceptions to copyright applicable to different categories of purposes. The scope of fairness under these sub-sections is to be determined as per the purposes defined therein and not the general factors used in the U.S. and other jurisdictions.³¹ It is based on a balancing test as the

²² *The Chancellor, Masters & Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services* (“*Rameshwari Photocopy*” case) 233 [2016] DLT 279.

²³ *Twentieth Century Music v. Aiken* [1975] 422 US 151.

²⁴ *ICC Development (International) Ltd & Anr v. New Delhi Television Ltd.* 193 [2012] DLT 279 [17].

²⁵ *ESPN Star Sports v. Global Broadcast News Ltd. & Ors.* [2008] 2 CTMR 494 (Delhi) (DB).

²⁶ *ICC Development (International) Ltd & Anr v. New Delhi Television Ltd.* 193 [2012] DLT 279 [17].

²⁷ *The Chancellor, Masters & Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services* 233 [2016] DLT 279.

²⁸ S.52 of the Copyright Act.

²⁹ *D.B. India TV Independent News Service Pvt. Ltd. & Ors. v. Yashraj Films Pvt. Ltd.* 192 [2012] DLT 502.

³⁰ S.52(1) of the Copyright Act.

³¹ *Rameshwari Photocopy* case, ¶ 31-35.

application of the respective provisions require courts to consider each case uniquely. The interests of the rights-holder are to be weighed against the legislative intent and social purpose of the right. The rights conferred have to fall within the ambit of the exception and exercised to the extent *justified* by the purpose that they have been excepted for.³²

Further, Indian courts have held the purpose of usage to be determinative of fairness even when commercial use is involved. Commercial use in itself does not invalidate the general fair dealing exceptions under Section 52. The Delhi High Court in the case of *Super Cassettes Industries Limited v. Hamar Television Network Pvt. Ltd. & Anr.*³³ held that the exceptions under Section 52(1)(a)(ii) or Section 52(1)(b)(ii) were inapplicable to the unauthorized usage of copyrighted work by the media companies. The decision, however, did not turn on commercial exploitation but the purpose of usage. As the infringing material was not found to be used for criticism or review, it did not fall within the said exceptions. The Court noted that commercial use simpliciter wouldn't make the use unfair if "*a defendant can rely upon the gateways carved in Section 52 or 39*"³⁴ and "*demonstrate that the copyrighted work is used for purposes indicated therein.*" Similar observations regarding commercial exploitation *ipso facto* not rendering the usage of a work unfair were made by the Delhi High Court quite expressly, in *ICC Development (International) Ltd & Anr v. New Delhi Television Ltd.*³⁵

This shows that where expressly stated, as in S.52(1)(a), the fair dealing standard will import global tests. However, this is not to say that fairness will not be read into sub-sections other than S.52(1)(a) where it is not expressly prescribed. Here, the court will determine the fairness of use based on the purpose of usage and the degree of its justification by the said purpose. This is because the aim of these subsections is not just to serve as exceptions to copyright but user rights meant to further public policy goals.

III. COPYRIGHT AS USER'S RIGHT IN INDIA

This section analyses case law interpreting Section 52 to argue that it has been read as a user right in India. User rights refer to valid permission for usage of copyrighted material

³² *Rameshwari Photocopy case*, ¶ 33.

³³ *Super Cassettes Industries Limited v. Hamar Television Network Pvt. Ltd. & Anr.* CS(OS) No. 1889/2009, decided on May 24, 2010.

³⁴ S. 39 of the Copyright Act.

³⁵ *ICC Development (International) Ltd & Anr v. New Delhi Television Ltd.* CS (OS) No. 2416/2012, decided on September 18, 2012.

without the right holder's authorization, conferred through exceptions to protection, limitations, definitions, protection against enforcement and in automatic remuneration schemes (statutory licenses or liability rules) mentioned within copyright statutes as well as diverse areas of law i.e. constitutional rights, consumer protection, competition etc.³⁶

The English fair dealing test laid down by Lord Denning in *Hubbard vs. Vosper*³⁷ was adopted and significantly expanded by the Canadian Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*³⁸ wherein Chief Justice Beverley McLachlin specified a fair dealing test based on six factors i.e. purpose, character, amount of and alternatives to the dealing, nature of the work and the impact of such dealing on it, as per Denning's judgment.³⁹ Copyright as user's right was most pronouncedly recognised and liberally interpreted by the Supreme Court of Canada in *CCH Canadian*.⁴⁰ The reasoning of *CCH Canadian* qua 'originality' has already been adopted by the Indian Supreme Court in the case of *Eastern BC vs D.B. Modak*.⁴¹ I argue that Indian jurisprudence has recognised S.52 exceptions to infringement of copyright as user rights by holding that wherever applicable they would not serve as excuses/defences for infringement but rather as user rights whose exercise would not constitute infringement in the first place as is evident from the holding in the *Rameshwari Photocopy* case.

Some jurists regard the distinction between considering the exceptions either as user rights or defences to infringement purely academic.⁴² However, it is material to note that dignifying the said exceptions with user rights status traces their origin to fundamental rights and public policy derived thereof, making their waiver contractually unenforceable and opening the possibility of enjoining copyright holders with an affirmative obligation to ensure that their copyrights are not at loggerheads with the exercise of user rights.⁴³ In the *Rameshwar Photocopy* case, even though J. Endlaw held that Section 52(1)(a) was inapplicable to the University's action, it was stated that photocopying of the impugned material by students for private or personal use would indeed constitute fair dealing and not copyright infringement,

³⁶ Washington College of Law, 'Copyright User Rights Survey', available at: <http://infojustice.org/survey>, last accessed 2 January 2018.

³⁷ *Hubbard v. Vosper* [1972] 2 Q.B. 84.

³⁸ *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 SCR 339; Vaver, David (2011). *Intellectual Property Law: Copyright, Patents, Trade-Marks* (2nd ed.). Toronto: Irwin Law ISBN 978-1-55221-209-7.

³⁹ *Supra* Note 32.

⁴⁰ *Supra* Note 32.

⁴¹ *Eastern BC vs D.B. Modak* [2008] 1 SCC 1 [37].

⁴² *Continental Casualty Co. v Beardsley* 151 F Supp 28, 31-32 (SDNY 1957).

⁴³ Pascale Chapdelaine, *Copyright User Rights* (OUP 2017) 48.

especially when reproduction of copyrighted work by both i.e. the students and the University has the same effect. This was done by laying emphasis on S.16 of the Act⁴⁴ and giving the rights of the owner a restrictive interpretation by holding that copyright was converted from a natural/common law right to a statutory right by the enactment of the statute and its exercise necessarily required statutory conditions to be satisfied.⁴⁵ In contrast, the user right, for instance, “in course of instruction” in S.52(1)(i), was interpreted extensively and reliance was placed on the German Federal SC in *Re. the Supply of Photocopies of Newspaper Articles by Public Library*⁴⁶ to support the conclusion that “the freedom to operate and the reproduction rights of authors were restricted in favour of freedom of information.”⁴⁷ J. Endlaw held that absent any limitation on the exercise of Section 52 exceptions by the legislature, the Court would not inquire into whether they “unreasonably prejudice the legitimate interest of the author” or are not justified for their respective purposes⁴⁸ as the legislature is presumed to have determined otherwise before enacting S.52. Such an understanding of Section 52 as guaranteeing user rights whose exercise is indispensable to furthering public policy allows us to determine the enforceability (or lack thereof) of a contractual waiver of such rights. This is analysed in the following section via an enquiry into the enforceability of contractual waivers of comparable rights.

IV. CONTRACTUAL WAIVER: AGAINST PUBLIC POLICY

In the case of *Gherulal Parekh*,⁴⁹ the Supreme Court of India relied on common law precedent to argue that “public policy” was synonymous with “the public good”, the ambit of which was subsequently expanded vastly in the case of *Brojo Nath Ganguly*.⁵⁰ This was the first case where the Supreme Court determined the (un)enforceability of a contract on the basis of distributive justice, unreasonableness, unconscionability, and unequal bargaining power between contracting parties in adhesion contracts. It held unreasonable contractual clauses to be unenforceable irrespective of their being consented to. The 199th Law Commission of India Report particularly highlighted concerns of unfairness in standard form contracts⁵¹ despite the

⁴⁴ Section 16 of the Copyright Act.

⁴⁵ *Rameshwari Photocopy case*.

⁴⁶ *Re. the Supply of Photocopies of Newspaper Articles by Public Library* [2000] ECC 237.

⁴⁷ *Supra* Note 20,.

⁴⁸ WIPO, Berne Convention (1971), Art.9 & 10.

⁴⁹ *Gherulal Parakh v. Mahadeodas Maiya* AIR 1959 SC 781.

⁵⁰ *Central Inland Water Transport Corporation v Brojo Nath Ganguly* AIR 1986 SC 1571.

⁵¹ 199th report of the Law Commission of India, “Unfair (Procedural & Substantive) Terms in Contract”, 199 (2006).

existence of special legislations such as the Consumer Protection Act, 1986 protecting consumers from unfairness in such contracts.

Further, post ratification of the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), fair dealing can be said to be a part of public policy in India.⁵² The Indian Supreme Court in the case of *Centrotrade Minerals and Metal. Inc. v. Hindustan Copper Limited*⁵³ held that a waiver of a benefit under statute is permissible only where public policy or interest are not subverted.⁵⁴ It was held in the case of *Basheshar Nath v. Income Tax Commissioner*, that certain rights are part of the Constitution as a matter of public policy and the doctrine of waiver cannot apply to such rights.⁵⁵ The Supreme Court further affirmed this reasoning in *Murlidhar Aggarwal and Anr v. State of Uttar Pradesh*⁵⁶ by disallowing a tenant's contractual waiver of the protection against eviction conferred upon him by Section 3 of the U.P (Temporary) Control of Rent and Eviction Act, 1947 as the safeguard was a statutory right granted as a matter of public policy and not a mere individual benefit. Further, the Supreme Court in *Lachoo Mal vs. Radhey Shyam*⁵⁷ and *Krishna Bahadur vs. M/S Purna Theatre & Ors.*, has held that “A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein.”⁵⁸ Though Indian courts have not dealt with the issue of enforcing a contractual waiver of user rights under the Copyright Act directly, the Delhi High Court in *Tekla Corporation & Anr v. Survo Ghosh & Anr.*⁵⁹ held that fair use of a protected work as allowed by Section 52 or any other provision of the Copyright Act could not be curtailed contractually as such a contract would violate public policy and hence be unenforceable. Justice Endlaw observed in the case that the copyright holder is “not entitled in law to impose any restrictions curtailing the fair use thereof” and that “the legal action even if any taken by holder of copyright against any other person for violating the conditions illegally imposed by the holder of copyright, would thus fail”. Further, the Income Tax Appellate Tribunal (Mumbai) held in the case of *Capgemini Business Services (I) v. Assessee (2016)*⁶⁰ that if a license agreement had a condition that restricted fair use of software otherwise

⁵² Matthan & Narendran, ‘Fair Dealing of Computer Programs in India’ [2011] IJLT 94.

⁵³ *Centrotrade Minerals and Metal. Inc. v. Hindustan Copper Limited* (2006) 11 SCC 245.

⁵⁴ Bhatia, *Supra* Note 22.

⁵⁵ *Basheshar Nath v. Income Tax Commissioner* AIR 1959 SC 149.

⁵⁶ *Murlidhar Aggarwal and Anr v. State of Uttar Pradesh* 1975 1 SCR 575.

⁵⁷ *Lachoo Mal vs. Radhey Shyam* AIR 1971 SC 2213, ¶6.

⁵⁸ *Krishna Bahadur vs. M/S Purna Theatre & Ors* Appeal (civil) 7251 of 2001.

⁵⁹ *Tekla Corporation & Anr v. Survo Ghosh & Anr.* AIR 2014 Del 184.

⁶⁰ *Capgemini Business Services (I) v. Assessee (2016)* 2016 (3) TMI 280.

available under the Copyright Act, it is unenforceable. Thus, as aforementioned because fair use is a part of public policy in India⁶¹, contractual waiver of user rights is against public policy and thereby unenforceable. In so far as free speech would conflict with a contractual waiver of user rights, the latter would be unenforceable for the former, by its very nature is predicated on public policy and interest.

Determination of fair use on a case to case basis leads to uncertainty and curtails users from fair dealing when in doubt because of risk averse lawyering. It contributes to a clearance and permissions culture. Contractual waivers lead to many negative externalities including chilling effects on free speech and fair dealing. This results in narrowing the scope of user rights as more and more people waive them away, or pay for their exercise.⁶² It makes their use without permission or payment progressively less routine until it is not considered “fair use” at all due to a creep in the doctrine of fair use itself.⁶³ When these rights are waived off through standard form contracts, the one sided terms apply to anyone who wants to access the work making them akin to “private legislation”,⁶⁴ bestowing exclusive rights on the owner wherein the material can only be accessed if one agrees to limit fair dealing or contract out of her fair use rights. In the U.S. even when express statutory prohibitions are absent, courts hold contractual provisions to be unenforceable per se (via pre-emption) due to contradiction of strong policies inherent in the statute,⁶⁵ especially when those policies are said to be determinative of public policy. The more pivotal an exception is to preclude copyright law from violating public policy, the more central it will be to the purpose of the Act, increasing the likelihood of the statute itself pre-empting its waiver contractually. However, pre-emption is mandatory only in cases where a narrow objective or purpose is frustrated due to contractual restriction of fair use. It is not essential where there arises a tension with the broad aims of the Act, in which case the rule of reason standard determines enforceability up to the court’s discretion.⁶⁶ This discretion is to be guided by the likelihood of furtherance of public policy by refusal to enforce the contract.⁶⁷ Under the rule of reason standard, contractual provisions violative of statutory policy may be considered enforceable subject to reasonability.⁶⁸

⁶¹ Matthan & Narendran, *Supra* Note 14.

⁶² James Gibson, ‘Risk Aversion and Rights Accretion in Intellectual Property Law’ [2007] 116 YLJ 885.

⁶³ Sara K. Stadler, ‘Incentive and Expectation in Copyright’ [2007] 58 HLJ 433.

⁶⁴ Julie Cohen, Lochner ‘In Cyberspace: The New Economic Orthodoxy of “Rights Management” [1998] MLR 462.

⁶⁵ E. Farnsworth, *Contracts* (4th edn, Wolters Kluwer 1982).

⁶⁶ Restatement (Second) Of Contracts § 178 (1981).

⁶⁷ *Ibid.*

⁶⁸ E. Farnsworth, *Supra* Note 10, § 5.5; Restatement (second) of Contracts § 178 (1981).

Contractual waiver of fair use rights is thus pre-empted by various public policy considerations that may be internal or external to the Copyright statute.

In the U.S., any contractual infringement of fair use rights that deprives users of freedom of speech and expression as per the 1st Amendment is said to be pre-empted and such contractual provisions are held to be unenforceable per se.⁶⁹ In the European Parliament's Reda report⁷⁰, the members emphasised the need for prevention of contractual waiver of user rights for the exercise of statutory limitations and exceptions under Copyright laws to be effective, and to facilitate access to content. This report on the implementation of Directive 2001/29/EC (the "Infosoc Directive") also drives home the point that sans rules protecting users from contractual/technological supersession⁷¹ of their rights contained in the current exceptions and limitations within copyright laws, right-holders and intermediaries will tread roughshod over these exceptions and thereby minimise the scope of their intended benefit for the public. Only some European Union members have domestic legislations that expressly regulate the contractual manipulation of copyright exceptions.⁷² For instance, as per Polish copyright law, private use is an exception to infringement. Copyright protection does not allow authors to restrict buyers from borrowing or copying products for private use in the interest of consumer welfare.⁷³

The Copyright Act in India, much like the Infosoc Directive and most other national copyright legislations does not pre-empt the mutilation and modification of such exceptions via contract. In most cases, the stronger party with greater, and sometimes all the bargaining power (in adhesion contracts) is the rights-holder enjoying a monopoly over granting permission for the usage of copyrighted work, leaving to the consumer a Hobson's choice and denying her access to the copyrighted work unless she agrees to abide by the conditions laid

⁶⁹ Cf. Denicola, *Copyright and Free Speeck Constitutional Limitations on the Protection of Expression*, 67 [1989] CALIF. L. REV. 283, 287-89.

⁷⁰ Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society - A8-0209/2015 Europarl.europa.eu, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2015-0209&language=EN>, last accessed January 13, 2018 (¶ 61).

⁷¹ TPM (Technological Protection Measures) and DRM (Digital Rights Management) provisions impose restrictions on user rights similar to adhesion contracts but a discussion on them is beyond the scope of this note.

⁷² Article 29 (4B) of British Copyright, Designs and Patents Act.; Article 2 (10) of Irish Copyright and Related Rights Act; Copyright and Related Rights Act, 2000; Article XI.193 of Belgian Code of Economic Law; Article 75 (5) of Portuguese Copyright and Related Rights Code.

⁷³ UOKiK - About us - About us - News - Reliable consumer information Uokik.gov.pl, https://uokik.gov.pl/news.php?news_id=1021, last accessed January 20, 2018.

down via separate agreements or licenses with rights-holders, akin to Henry Ford's famous exposition, "*A customer can have a car painted any colour that he wants so long as it is black*".⁷⁴

Contract provisions in adhesion contracts try to expand the scope of rights-holders' rights by limiting the dissemination/use of the protected materials and are unenforceable in most jurisdictions if reasonably unexpected by the non-drafting party or against public policy due to unconscionability or undue oppression.⁷⁵

V. CONCLUSION

To determine the enforceability of a contract, it is important to firstly expose the goals, purposes and policies inherently a part of copyright statutes.⁷⁶ Where the objective of a certain provision of the Act is amply clear, conflicting contracts can be said to be unenforceable per se by virtue of pre-emption, or as mandated expressly within statutory provisions themselves.⁷⁷

In India, S.52 of the Copyright Act accommodates constitutional freedoms within statutory exceptions. It does not confer upon individuals a private right that can be waived off but a statutory right based on public interest and policy whose legislative purpose is to protect fundamental rights. It cannot be waived off, just like fundamental rights themselves,⁷⁸ and enforcing such a waiver would defeat the purpose of S.52.

Finally, we are still developing our IPR regime. The benchmark set via the *Rameshwari photocopy case*⁷⁹ promises to favour public policy. It is indeed a landmark segue into restraining subsequent corporates and copyright holders from exploiting the populace by overriding S.52 user rights through standard form contracts.

⁷⁴ 'On the Need to Protect Copyright Exceptions from Contractual Interference' - International Communia Association, available at: <https://www.communia-association.org/2015/07/30/on-the-need-to-protect-copyright-exceptions-from-contractual-interference/>, last visited Jan 2, 2018.

⁷⁵ *Cubic Corp. v. Marty*, 1 U.S.P.Q.2d (BNA) 1709, 1712-13 (1986).

⁷⁶ *Supra* Note 1, 824.

⁷⁷ *Ibid*, 824.

⁷⁸ Heath & Liu, 'Copyright Law and the Information Society in Asia' (Hart, 2006); *Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.* 1985 SCC (3) 545.

⁷⁹ *Rameshwari Photocopy case*.

