

PHOTOCOPYING OF COPYRIGHTED MATERIAL IN LIGHT OF THE DELHI UNIVERSITY PHOTOCOPY CASE

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ABSTRACT

The primary theme of this article is to examine the decision given by the Division Bench of the Delhi High Court in the Delhi University Photocopy case. Presently, the dispute between fair dealing and the rival stakes of the copyright holders has become even more vigorous because of the controversy that has been created as a result of the legal action taken by three prominent publishers against a photocopy shop located at the core of the Delhi University. The article analyses the Indian position with regard to photocopying of copyrighted works for educational purposes in light of the decision given in the abovementioned case. The article will also demonstrate how the Court has erred in its judgment and how the same would deprive the publishers of the revenues which they would otherwise be entitled to obtain.

INTRODUCTION

It has become fiercely effortless to make photocopies of printed material since the advent of the photocopying machine in the year 1954. Copyright owners are startled by the advancement in technology that reduces the burden of copying these works. There has been a debate since 1960s over the need to balance the competing interests of the copyright owner's vis-à-vis the user's right of access and to thus come up with a legal solution to resolve this¹.

A case was filed in the Delhi High Court by three international publishers and their Indian counterparts, Oxford University Press, Cambridge University Press, and Taylor and Francis against Rameshwari Photocopy Service (Defendant No.1) and the University of Delhi (Defendant No.2) for the grant of permanent injunction². The principal objection raised was

¹ Henry P. Tseng, *Ethical aspects of photocopying as they pertain to the library, the user and the owner of copyright*, 72 Law Library Journal, 86, 86 (1979), available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/lj72&div=16&id=&page=>

² University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 5128.

that photocopying the course packs bound volumes which contained parts from various textbooks violated the copyright of the plaintiffs. Accordingly, in October 2012, the Court issued a temporary injunction thereby preventing the photocopy shop from selling the course packs until the final disposal of the case.

ARGUMENTS ADVANCED

The Defendant No. 1 denied the allegations of copyright infringement and stated that its actions come within the purview of the fair use exception granted in Section 52(1)(a) and (h) of the Copyright Act, 1957. The Defendant No. 1 also stated that the syllabus is determined by the University and the same includes suggested readings of some chapters from various books and since these books are highly priced the students are unable to spare the price of the same. It was also further contested that a fixed number of abovementioned books are accessible in the University's library for reference purpose but the same can't cater to the needs of all students because of which Delhi School of Economics, University of Delhi prepared master copies of the books which are then used for photocopying. The Defendant photocopier also rejected the Plaintiffs allegation by stating that they're not commercially exploiting the author's copyright. The Defendant No. 2, on the other hand, petitioned that Section 52(1)(a) and (h) gives the green light to copy for use in research and classroom by students and teachers. The defendant university also stated that since the books are overpriced, photocopying of the books becomes crucial. The Plaintiffs, on the other hand, contested that if the defendant university obtains a licence for course packs from the Reprographic Rights Organization then the students won't have to pay more than what they are already paying to the Defendant No. 1. The plaintiffs also alleged that the said course packs contained only the material from the plaintiffs' publications and nothing more. It was also argued that the profit motive is indisputable since the Defendant No. 1 is commercially competing with the plaintiffs by charging 40/50 paise per leaf which was more than the existing market rate of 20/25 paise per leaf. The plaintiffs also narrowly interpreted Section 52(1)(i) in alleging that the same is not applicable as the reproduction was not made by a teacher or a pupil in the course of instruction. The plaintiffs also maintained that Section 52(1)(g) prior to the Copyright (Amendment Act), 2012 which is equivalent to Section 52(1)(h) post-amendment substituted the words "intended for the use of educational institutions" with "intended for instructional use" and that Section 52(1)(h) alone is applicable to the case at hand. The plaintiffs also claimed that if Section 52(1)(i) was interpreted in a manner so as to allow the teacher to make copies for the purpose of instruction there would be

no need of Section 52(1)(h) and that the defendants actions contravene Section. 14(a)(i) and (ii). The plaintiffs further demanded that photocopying in the field of education cannot be allowed because of the reason that it is the only market of the textbooks and as the same would have a detrimental effect on the publishing business. Association of Students for Equitable Access to Knowledge (ASEAK) and Society for Promoting Educational Access and Knowledge (ASEAK) were also impleaded as parties to the suit.

LEGAL ISSUES INVOLVED

A bird's eye view would reveal that there are only two issues involved. They being:

- (1) Whether copying was permissible under the Copyright Act?
- (2) Whether such copying amounts to fair use under the provisions of the Copyright Act?

JUDGMENT OF THE COURT

Decision of the Single Judge Bench

Rajiv Sahai Endlaw J held copyright is a statutory right and that photocopying portions from books and distributing them to students for educational purposes did not amount to copyright infringement. It was held that the act of photocopying and making of course packs by the Delhi University is sheltered under the exception under Section 52(1)(i) of the Copyright Act, 1957 as there was no actionable infringement. The Court held that the expression "to reproduce the work" under Section 14(a)(i) would include photocopying as well. The Court stated that supplying of copies of the book by the DU library would be proper as the principle of exhaustion, which is the genesis of libraries, educational institutions and field of resale of books, directly comes into picture.

Decision of the Division Bench:

Aggrieved by the decision of the single judge bench, an appeal was brought to the Division Bench of the Delhi High Court which comprised of Justices Pradeep Nandrajog and Yogesh Khanna³. The Bench rejected the appeal upholding and expanding the Single Bench's order. It held that photocopying of copyrighted material was permitted under the Copyright Act and that there could not be any caps on how much of a book could be photocopied if the same was

³ Masters and Scholars of University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229.

warranted by the demands of the course. It thus promoted student's right to economical education.

The Division bench sent the matter back to the single judge bench to decide whether each of the supposed instances of copyright came within the gauntlet of the educational exception or not. The Publishers however filed an application seeking withdrawal of the suit on March 9, 2017.

ANALYSIS

The legal deductions in the judgment which form the real crux continue to be in favor of the University. The judgment centres around the interpretation of Section 52(1)(i) of the Copyright Act, 1957 which relates to photocopying for educational and teaching purpose and when this is legal. It gives an exhaustive list and states that any use of copyrighted work not falling under this list would amount to copyright infringement.⁴ In this background, the court seeks to explain two important questions.

The question arises as to how to determine whether the use is fair use when the copyrighted work is used for educational purpose?

The view of fairness in every action and especially when a person's result of labour is being utilized by somebody else, fair use must be read into the statute is endorsed⁵. The expression "fair use" is ordinarily understood to indicate a precise test in the copyright law⁶. All over the world, courts contemplate four non-exhaustive determinants while testing if a particular use can be called a fair use or not⁷. These being: purpose of the use, amount and substantiality of the portion used, nature of the work and effect of the use on the prospective market⁸.

The court completely deviated from this test and constructed another one. The new yardstick for fairness of educational use is to check if the extent of the use is justified by its purpose. If yes then it is legally guarded and won't amount to copyright infringement. The court explained

⁴ "Fair Dealing" in Copyrights: Is the Indian law competent enough to meet the current challenges?, available at <http://www.mondaq.com/india/x/299252/Copyright/Fair+Dealing+In+Copyrights+Is+The+Indian+Law+Competent+Enough+To+Meet+The+Current+Challenges>, last seen on 12/3/2017.

⁵ Supra 3.

⁶ Harper & Row Publishers v. Nation Enterprises, 471 US 539 (1985, Supreme Court of the United States)

⁷ Campbell v Accuff-Rose Music, 510 US 569 (1994, Supreme Court of the United States)

⁸ 17 U.S.C. S. 17 (United States)

this by saying “so much of the copyrighted work can be used which is necessary to effectuate the purpose of the use, i.e., make the learner understand what is intended to be understood.”

To put it in different words, the students can use the copyrighted work without any limitation and the same will be treated as fair use as long as they are doing it to learn what they need to.

This new requirement is unsound for various reasons. It is subjective to the point that it is difficult to prove, self fulfilling and individual specific. Logically, every student has a different learning pace and curve. In such a scenario, it becomes difficult to determine when an individual has completed this process and eventually learned. Whether this end point really exists? Another question which comes up is whether it is likely for every pupil to rely on the same, uniform texts as everybody else and individually reach that ideal tip? An important factor about variance in the classroom is the deep attentiveness, curiosity and understanding which only some students bring to the table and which rubs off on others over time. In a fluid and communicable as learning, it would be impractical to tell when one can stop as there is conceivably no limit.

At the possibility of oversimplifying, this leaves the court with two options. One, to be opinionated and thereby introduce an irrational line to learning. For example, it could say that the pupil has reached the end result of learning once the syllabus is complete. This would be a disastrous perspective. Or it can think of education extensively as it must. However, this would make the new requirement completely self fulfilling. In case the court conceptualizes learning and education so widely then it would start with a foregone conclusion. Any use of copyrighted material by students to any length for educational and learning purpose would be viewed as just and the same would be protected.

This is not an issue per se. In fact, this end result, like the Single Judge Bench’s decision, persists in giving students broad access to educational material. But, it does this by weakening the integrity of the concept of copyright and divesting the publishers of earnings that they have a right to as copyright owners. This leads to the second question.

Whether the use of copyrighted work by students for educational purpose is detrimental to the publisher’s interests?

The Division Bench fleetingly contemplated whether the students and teacher’s actions will be unfavourable to the market for these copyrighted work.

The court here pointed out that because the students would never have thought of buying the full books, they're never the publishers market. This reasoning completely ignores the point of the publisher's case. In this scenario, the university was the prospective customer and not the student. The publishers did not intend to force the students into buying their books, an intention which the bench accepted. The publishers wanted the university to get a licence so that the students could xerox the text they required⁹. They were of the opinion that a licence from the IRRO would solve the entire problem¹⁰. The court failed to acknowledge the financial effect on the publishers by refashioning the publisher's agreement as one against the students rather than the university.

If such wide-reaching photocopying is allowed then the Delhi University and other such universities would hardly think about investing money in buying these books. Immediately after the university buys a copy of an academic textbook, the students are free to photocopy the relevant sections in order to achieve their purpose of learning. This standard is low and ambiguous. Both the students and the university benefit from this. The university will have to pay a lesser amount. The publishers, on the other hand, are deprived of a lot of money¹¹. By permitting photocopying of academic textbooks on such a wide scale, the court has freed the university from the burden of either getting a licence from the copyright societies or buying a fair number of books.

The factor of "nature of the work" in the standard fair use test which was rejected by the court is important in this case. When famous literature and movies are used in the classrooms for teaching and instruction then the owners of these copyrighted works would barely notice as there are a lot of people who buy movie tickets and books for entertainment. So their main market remains uninfluenced and there would be no infringement of copyright¹². The case of academic textbooks, on the other hand, is different as they have a restricted audience¹³ because of the technical language and subject matter which in turn serves only people in specialized fields. If students and teachers, which predominantly form the publisher's audience, are

⁹ The same was dealt with in *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (1996, 6th Cir.)

¹⁰ Shamnad Basheer, *Breaking News: IRRO Registration Refused!*, SpicyIP, <https://spicyip.com/2013/12/breaking-news-irro-registration-refused.html>, last seen on 12/3/2017.

¹¹ *The New Copyright Law: Photocopying for Educational Use*, Jstor, available at https://www.jstor.org/stable/40225000?seq=1#page_scan///-tab_contents, last seen on 13/3/2017.

¹² 17 U.S.C. S. 17 (United States)

¹³ *Delhi HC's fresh air on photocopying law*, Deccan Herald, available at <http://www.deccanherald.com/content/572994/delhi-hcs-fresh-air-photocopying.html>, last seen on 10/3/2017.

allowed to photocopy the portions they need, then the same would have a negative effect on the market of the academic publishers. The court's logic here reflects how it has superficially comprehended the economics at play.

The students would have continued to derive this benefit even after the university took a licence. The publishers too would have got rewarded for their investment. In such a situation, the university would have been asked to pay to make sure that the students can access the academic material.

The University emerges as a winner in all this as it has in some way been able to wrangle a subsidy for the pupils. Barring the loss to the publishers, the rights of the copyright owners have also been hit by this decision.

CONCLUSION

The Copyright Act provides safeguards for educational purposes but the same should not be used in a way which is detrimental to the copyright holders. It would be advantageous if the courts come out with directions as to the acceptable extent of copying. The law should dictate how much a pupil can claim and how much an author can allow.

The difficulty crops up while maintaining equilibrium between the interests of the copyright owners and the users interest. In this, organizations like Reprographic Rights Organization have a significant role to play as they open doors to inexpensive access to information. But there has to be a robust law in force for IRRO to function efficaciously in order to mutually save the interests of the users and the copyright holders. In truth, IRRO is the only licensing authority in the country in the area of literary works and it gives licences every year which cover magazines, books, etc for reprography as per law. If it is presented with organizational facilities, strength and substance then it can be victorious in shielding the rights of the copyright holders and the users. Thus, a lot of magnitude should be given to offer unambiguous machinery to the IRRO by framing legislations to benefit users and copyright holders. Lastly, India is at the brim of a new age, where occupations such as that of a writer or a researcher are taking the front line. Therefore, in order to kindle the favourable transformation, the courts of India ought to ensure that the hardworking research organizations and authors are monetarily incentivized commensurate to their work. The judgment of the court in the case at hand is surely not in the same direction and will definitely further curb the already under-incentivised authors.