

THE EFFECT OF COPYRIGHT ON EDUCATION: THE DELHI UNIVERSITY PHOTOCOPY CASE

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ABSTRACT

In this paper we consider the implications that the recent judgment of the Delhi High Court in the Delhi University Photocopy Case has on education and the copyright law in India. This article aims at understanding the copyright jurisprudence that brought about clarity to the copyright law with special regard to education. It also examines the various circumstances under which copyright may be allowed, going into the reasoning for the same. It compares cases nationally and internationally in order to understand the stances of other countries at a global level with respect to what constitutes “fair” and “reasonable” in the case of copyright. The rights of students for the purpose of education is also considered in order to understand the rights that they have against copyright holders and the rights that these copyright holders; publishers and authors have in order to profit from their work. This article provides recommendations for actions that should be considered to further the judgment passed in a way that would benefit publishers and the student population at large. The development of think tanks in India and their increasing role in the part that they would play for the purchase of research books and material should be taken into consideration while the publishers make the same material available to students with the aim of reducing the cost. It recommends that the publishers provide the material online at a student friendly rate, which would cut down costs and encourage the building of E-libraries. Through the system of E-libraries, the publishers would get the credit they are due while students can access the information at more affordable rates. It also recommends licenses be granted by the publishers to universities to maintain books given in the library to increase accessibility coming to an agreement rather than a compromise for the students, universities and publishers.

INTRODUCTION

The Delhi University Photocopy case deals with the right to affordable education of Indian students with the Delhi High Court ruling that there is no restriction with regard to how much of a book can be photocopied as long as the course is in demand of it.

This case began with a law suit in 2012 which was brought about by leading publishers- Cambridge University Press, Oxford University Press and Taylor & Francis. The allegation made was that Delhi University and Rameshwari Photocopy Service; Delhi University's photocopying agent, were involved in a heavy amount of copyright infringement by creating course packs which consisted of copyrighted excerpts from books for the students.

The Association of Students for Educational Access to Knowledge and Society for Promotion of Equitable Access to Knowledge were then granted permission by the court to intervene in the matter and support Delhi University.

It was ruled, by a single judge, Justice Rajiv Sahai Endlaw, that the photocopying was legal under the Indian Copyright Act¹ as an exception with regard to education. The section provides that any "reproduction" of copyrighted material in the "course of instruction" by "teachers or students" is legal and does not amount to copyright infringement.

The publishers had appealed against this order.

The appellate court, in the case, took note that "course of instruction" could not be as narrow as to limit it to what was taught in the classroom. In a matter of a month the court decided the matter and was in consonance with the judgment given earlier by the single judge.

INTERPRETATION OF THE "FAIR USE" DOCTRINE

It is important that the judiciary of India is able to interpret the doctrine of "Fair Use" in a liberal manner. The needs of the society and the needs of the publishers are to be balanced. In the Delhi University case the education of children and the right to education as provided for in

¹The Copyright Act, 1957 s. 52(1)(i).

the Indian Constitution as a Fundamental Right is considered as progressively more important than that of the publishers and the profit motive that ensues. The exception of Education under the Copyright Act should be widened by liberally interpreting “Fair Use” instead of there being monopolisation of education by the inherent need of profit that consumes publishers.

It is an important question to ask that would the children have bought the books published if they had not have had access to course packs?

The prices of the books are considerably high. The publishers would not have been at any loss as regardless of the photocopies being made, the children would not have been able to afford to buy the books at the price provided in the first place. Therefore the need of education over the need of the publishers making profit must be taken into consideration. Students should be able to have access to material for their course. There should not be any kind of cap on the material that is being photocopied; students should be at liberty to photocopy a book assigned to them by a professor.

In a developing country such as India, in order for the nation to progress as a whole, education has always been an integral aspect. If students do not have access to material for their course can it really be considered as an effective system of education?

With regard to the making of profits by publishers, it can be seen that there have been an increasing number of think tanks being established in India.

ROLE OF THINK TANKS IN INDIA

Think tanks such as IDSA and the National Council of Applied Economic Research (NCAER) have been active in India since the mid-20th century. But the last 25 years have witnessed a tremendous growth and proliferation of Indian institutions, including privately-funded entities and military service-specific think tanks (the Centre for Land and Warfare Studies, the Centre for Air Power Studies, and the National Maritime Foundation).²

²Dhruva Jaishankar, Can India’s Think tanks Be Truly Effective? BROOKINGS (Sep. 24, 2017, 11.15AM), <https://www.brookings.edu/opinions/can-indias-think-tanks-be-truly-effective/>.

There was an annual compilation carried out by the Think Tanks and Civil Societies Program (TTCSP) of the University of Pennsylvania which determined the number of think tanks in India at 192 in 2014 and 280 in 2015.

With this rapid increase, India has surpassed Germany to become the country with the fourth highest number of think tanks in the world.

Samir Saran, senior fellow and vice president of the Observer Research Foundation (ORF), stated that while India's economic and social policy debates have always involved non-governmental experts; the current government is particularly keen to "take on board voices from outside its corridors". Ministers are seeking input into a range of issues, he adds, from strategic and security policies to India's position on climate change. "Social policy making and foreign policy discussions are witnessing robust think tank participation."³

With the increase in think tanks in India, these think tanks can purchase the books published that would contribute to the profits of the publishers instead of the publishers imposing the price of these books on the students to derive profit.

THE USE OF COURSEPACKS IN INSTITUTIONS

Course packs, which are ubiquitous in higher education, allow professors to assign important reading in books and journals that would be too costly for students to purchase individually. Many professors rely on the flexibility and individuality that photocopied course readings or course packs can provide. Professors assigned books, which students purchase. The course packs supplement the assigned books and may include journal articles, material that is difficult to find, newspaper articles, excerpts from books, course notes and syllabi.⁴

Classroom use of the course packs promotes learning without undue harm to the incentives to create original works; that course packs are particularly helpful in interdisciplinary courses that

³ Alexandra Katz, The Remarkable Rise Of India's Think Tanks, GLOBAL GOVERNMENT FORUM (Sep. 24, 2017, 5:30PM), <https://www.globalgovernmentforum.com/the-remarkable-rise-of-indias-think-tanks/>.

⁴Princeton University Press V. Michigan Doc., 99 F.3d 1381 (6th Cir. 1996).

draw small portions from a number of disciplines; and that the record contains no evidence that the market of the original work was affected by the use of excerpts in course packs.⁵

In the case of the University of Michigan and other institutions in the Ann Arbor area, it was held that there was no exploitation of the copyrighted material because the fee was not based on the content of the book that was copied. It was charged by the page, regardless of whether the content was copyrighted; “while the copy shop is a commercial enterprise, the copying of course packs is for educational purposes; since the course packs are priced per-page based on copying costs, regardless of the contents, the copy shop is not making a commercial gain off the copyrighted materials” as stated in the judgment of the case.

Under the provision of fair use in copyright law, reproducing copyrighted material is acceptable for teaching which is inclusive of multiple copies for the use in a classroom.

The law puts forward four factors that are to be considered to determine whether fair use has been followed:

- The character of the use, including whether it is for a commercial or non-profit purpose;
- The nature of the copyrighted work;
- The length and importance of the portion used in relation to the copyrighted work as a whole;
- The effect of its use on the copyrighted work's potential market and value.⁶

In the Michigan case it was also stated that the business of producing and selling course packs is viewed more properly as “the exploitation of professional copying technologies and the inability of academic parties to reproduce materials efficiently, not the exploitation of copyrighted, creative materials.” It was held “that the Copyright Act does not prohibit professors and students who make copies themselves from using the photo reproduction services of a third party in order to obtain those same copies at less cost.”

⁵Princeton University Press V. Michigan Doc., 99 F.3d 1381 (6th Cir. 1996).

⁶ Jacqueline Kent, Coursepack Discussion, H-WOMEN, (Sep. 24, 2017, 12:35PM), H-<https://networks.h-net.org/node/24029/pages/31367/coursepack-discussion>.

John B. Thompson, a sociology professor at Cambridge stated that course packs “fulfil a real need in the field of higher education, enabling professors to provide students with materials that will enrich the learning experience and, indeed, to tailor the materials they use in the classroom to the way they want to teach their courses rather than the other way round.”

In another case, it was held by Lord Atkinson that a “product of skill, labour, capital of one man which must not be appropriated by another; not elements, raw materials; to secure copyright, necessary that skill, labour, capital expended sufficiently to impart on product quality, character which raw material did not possess, which differentiates product from raw material ”⁷

In a case in New Zealand it was considered that 'educational provisions' which are contained in the Copyright Act, 1994 represent a compromise between the interest of the copyright owners and the educational institutions. The Berne Convention principles were also looked into, and in accordance with these principles, students are allowed to make their own copy of copyrighted work for “research” or “private study” which would constitute as fair dealing. “A teacher giving a lesson at an educational establishment is permitted to make one copy of literary work for use in the course of instruction.”⁸

In *Longman Group Ltd v Carrington Technical Institute*⁹, it was held that multiple copying of entire works for use in a “course of instruction” would be permitted.

Therefore, the decision made by the court can be seen to conform with existing law. The reasoning is consistent with previous reasoning in similar cases.

Being the first of its kind in India, this case will significantly influence existing law with regard to copyright and the right to education.

The court adequately justified its reasoning and the interpretation of the law can be seen to be appropriate considering the needs of the society- in a developing country like India, where the right to education was considered of higher importance than the right to profits of the publisher.

⁷MacMillan & Co Ltd v J Cooper (1923) 93 PJPC 113.

⁸The Berne Convention (s44 (1)).

⁹ Longman Group Ltd. v. Carrington Technical Institute (1991) 2 NZLR 574, 590.

IMPLICATION OF THE JUDGMENT ON THE RIGHTS OF THE PUBLISHERS

This judgment is first of its kind in India and hence, the courts did not really have any set precedents to follow while giving the judgment. The advocates of open access to books were very appreciative of this judgment as it promotes the Right to Affordable Education in India.

This judgment has reflected the incapability of Indian courts to combine legal outcomes with strong business models.

This judgment has received a lot of brickbats by considering the rights of the publishers (which per se) haven't been violated legally, but philosophically looking at the ownership aspect of the work of the authors and all the efforts publishers and editors put in to create quality text books have been violated. This judgment not only gives the rights to institutions and the students to flagrantly photocopy how much ever percentage of the textbooks for reference but also, with no line drawing in sight, the verdict has taken away all incentive on the part of academic publishers to put in the effort for professional editing and committed marketing. Making of course packs by photocopying selected texts from already existing books and compiling all the information to make one separate book or course pack is a definite plunder for commercial purposes as it is obvious that students would go for the cheaper concise and compiled version of their syllabi rather than putting an effort to gain knowledge the right way.

Even if one were to assume that academic authors are less interested in royalties from their writings, no academic author or publisher would like to see some cash rich venture-capital funded ed-tech start-up rampantly copying their work and cashing in on the license-free pass granted by the Delhi HC. Unfortunately, the court in its mission to enhance access to subsidized students did not consider this logical consequence of its view on "instruction". Anyone can be a teacher, and anyone a pupil, in the emerging world of Smartphone-enabled "instruction". When these new non-institutionalized actors in the education space start copying books without taking a license, publishers will have no choice but to shut down.¹⁰

¹⁰ Anant Padmanabham, Reading it wrong, The Indian Express, (Oct.23, 2017, 4:31PM), <http://indianexpress.com/article/opinion/columns/university-of-oxford-rameshwari-photocopy-services-delhi-high-court-photocopy-litigation-intellectual-property-rights-3081341/>

ALTERNATIVE SUGGESTIONS TO THIS JUDGMENT

The court should've directed the Government to give the publishers tax exemptions (books for educational purposes only), which in turn could be an incentive for the publishers to reduce the price of the books, thus making it cheaper and more affordable for students.

This judgment was given amidst the age of vast technological breakthroughs where everything is becoming digitalized. The court, rather than blatantly denying it as a Copyright violation should have made it possible for the students to access the books in a digital format by directing the Publishers to provide it at an affordable/ student friendly rate. This not only would have established an E-Library culture in India, but also would've given credit to the publishers for putting in effort for the work they do.

The court could have also directed the University to take the licenses (which are given to Universities at a cheaper rate) from the Publishers to maintain those books in the library in an abundant quantity (availability of books in more numbers) so that it would be accessible by more number of students. This line of thought was expressed by prominent critics of the literary community as they felt that making course packs and selling it to students devoid them from the actual learning process of going to the library and researching from a vast pool of knowledge.

The distribution of course packs is spoon feeding the students. When students enter the University stage of education, it expected from them to apply their knowledge and enhance their research skills by going through a lot of available literature on a specific topic and knowing what is needed and what is not. The method of referring to course packs degrades the level and value of education. This also acts as a disincentive to publishers to put in efforts to publish books.

CONCLUSION

Making course packs and selling them (even though in furtherance of education), is inherently a commercial activity. The intention with what the photocopiers make and sell the course packs is not for benefiting the students but for increasing their revenue. Thus, this judgment may seem a little off track since it is indirectly promoting copyright violation.

It is different when a student individually photocopies material, in contrast to the photocopier selling the course pack as a textbook itself.

If the court really wanted to promote the 'right to affordable education', it could have directed the government to formulate new policies with regard to that aspect rather than hampering the intellectual property rights of another entity.

One of the main roles/duties of a publisher is to look for opportunities to sell copies of the books. Here, if in the name of education, if the right to photocopy, how much ever portion of a book is allowed, it will only motivate them to duplicate the original books and sell them at a cheaper price. This indirectly promotes piracy.

The publishers spend thousands or even lakhs of rupees in promoting their books. All this promotion could attract the prospective buyers of the books, but if a cheaper version of something were available why would anyone want to buy something that is more expensive?

Thus, because of this judgment, the publishers have lost their incentive to produce books in India anymore as no middle ground was seen by the court, since they know, the books would get copied and duplicated faster than at the rate of the books being sold in the market.

Though this judgment received criticism from the literary community for not having taken into consideration the rights of the Publishers, this decision given by the Delhi High Court has given a new meaning to the term 'fair use' and has established that fair use is not determined by the quality or quantity of the Copyrighted work used, but rather it depends upon the pure intention behind the usage of such works.

This judgment is not only a triumph for students as their Right to Affordable Education was promoted; this also is a breakthrough for India's Copyright Regime. This judgment has cleared the ambiguities with respect to Section 52 (1) of the Act which deals with the exceptions to what constitutes as a Copyright violation.