

# COPYRIGHT VIOLATION OR ACCESS TO EDUCATION: NAVIGATING LEGAL DICHOTOMIES

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## ABSTRACT

*This article is an analysis the recent judgement of a single judge bench of the Delhi High Court regarding the legality of unauthorised photocopying of academic works for the creation of university course-packs. Having explored the reasoning of the Court, which decisively ruled in favour of unauthorised photocopying, the article not only proceeds to elucidate the legal dichotomies that the Court's textualist approach creates and fails to resolve, but also provides an alternative reading of the law within its temporal context that seeks to balance the conflicting interests in a nuanced manner. The article also engages with the publishers' concerns of economic disincentives that might arise from unauthorised photocopying for the creation of course-packs, highlighting the specious nature of such an argument. Finally, it questions the Court's dismissal of concerns regarding Indian's international obligations, arguing that the Court's position is an explicit departure from the same. Based on the above analysis, this article evaluates the contribution of the judgement to the global discourse on the apparent dichotomy between concerns of education and copyright protection, concluding that the judgement provides a progressive jurisprudence of user rights founded upon the exigencies of access to affordable education.*

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## I. INTRODUCTION

Can a university department legally authorise the photocopying of copyright protected works while designing course packs for their curriculum? This was the primary question before a single judge bench in the High Court of Delhi,<sup>1</sup> in a lawsuit filed by three global publishing giants, namely Oxford University Press, Cambridge University Press and Taylor & Francis, who alleged large scale copyright infringement by Delhi University and Rameshwari Photocopy Service, the licensed agent of the former.

Determining an issue that goes to the very heart of concerns regarding access to education in India, Justice Endlaw emphatically ruled against the copyright holders, noting that the Indian Copyright Act<sup>2</sup> includes an exception, which permits the “reproduction” of copyrighted works for educational purposes, and hence does not amount to copyright infringement. Although the judgement has been widely celebrated as a landmark victory for education in India, certain apprehensions have been voiced. First, whether viewing photocopying for an educational purpose, as an absolute exception to copyright infringement, is a suitable approach that adequately balances conflicting interests. Second, whether the judgement implies that entire copyrighted works may be reproduced for the purpose of education, and if so, the impact of the same on the economic interests of the publishers. And finally, whether the Court’s reading of the education exception is in consonance with international norms governing copyright protection and fair use. In light of the above, this analysis seeks to elucidate the dichotomous perspectives that inform the legal debate regarding access to education and protection of intellectual property rights, and critique the above judgement on its contribution to the same.

## II. TEXTUALISM: CONSTRUCTING LEGAL BINARIES

The Indian Copyright Act 1957 lays out a set of instances or acts, which are not to be deemed as infringements of copyrights. The education exception, enumerated in Section 52(1)(i) refers to *inter alia* “a reproduction of any work by a teacher or a pupil in the course of instruction”.<sup>3</sup> In this context the plaintiffs raised the contention that the aforementioned exception was limited to lectures, tutorials and other instances of direct interaction wherein

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<sup>1</sup> The Chancellor, Masters & Scholars of the University of Oxford & Ors v Rameshwari Photocopy Services & Anr CS(OS) 2439/2012 I.As. No 14632/2012, 430/2013 & 3455/2013 (Delhi High Court 16 September 2016).

<sup>2</sup> The Indian Copyright Act 1957.

<sup>3</sup> The Indian Copyright Act 1957, S. 52(1) (i).

copyrighted material may be used.<sup>4</sup> Rejecting the argument, the Court examined various judicial interpretations of the phrases “instruction” and “in the course of”, and concluded that they would include prescription of syllabus which both student and teacher must prepare for prior to the actual lecture, studies undertaken by students post lecture and framing of questions for examinations based on the same works, which the students may reproduce while answering the same.<sup>5</sup> This finding was fundamental to the outcome of the case, due to the following reason.

One of the first issues to be determined by the Court, was whether the making of course packs by the two defendants amounted to a copyright infringement. It was submitted by the defendants, and accepted by the Court, that the question of licensing raised by the plaintiffs would only arise, if the said use amounted to a copyright infringement in the first place. The Court’s interpretation of the law thus operated within the following binary. Either, as contended by the plaintiffs, the present systematic photocopying constituted a copyright infringement, which thereafter could be contained within a negotiated licensing framework, *or* the defendants had the legal *right to use* the copyrighted material to make course packs, thus precluding the question of negotiating a licensing agreement altogether. The adoption of this approach by the Court was rooted in its textualist reading of Section 52, which *prima facie* enumerated certain acts not amounting to infringement of copyright. Therefore upon finding that the instant case of photocopying was within the ambit of Section 52(1)(i) Justice Endlaw promptly concluded that there had been no infringement, for the defendants had a *statutory right* to use the works copyrighted by the plaintiffs, and dismissed the suit as no trial was required.

#### ***A. Reading the law in context***

The Court’s reading of the Indian Copyright Act, particularly Section 52, at first glance, appears to be quite an accurate and cogently reasoned interpretation of the legal text, concluding that the instant use falls within an exception to the publishers’ copyright.<sup>6</sup> Despite being widely celebrated as a major victory for a framework of access to affordable

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<sup>4</sup> The Chancellor, Masters & Scholars of the University of Oxford & Ors, *supra* note 1, ¶ 59.

<sup>5</sup> *Id* ¶ 72.

<sup>6</sup> Liang, L. (2010). Exceptions and Limitations in Indian Copyright Law for Education: An Assessment. *The Law and Development Review*, 3(2), p.199.

education,<sup>7</sup> counterviews have pointed out a fundamental flaw in the Court's reading of the law, which impaired its appreciation of copyright, and fair use exceptions. While a textual reading of the Act may agree with the binary approach of the Court, the conclusion of such an approach, the complete deprivation of the publishers of rights over their works within the broad scope of educational use, fails to balance the interests that Copyright Law in principle seeks to protect. In other words, critics of the judgement argue that the absolute nature of the binary approach precludes an alternative and more balanced understanding of the relationship between copyrights and reproduction of works for educational purposes under the Indian Copyright Act.

In order to appreciate the above argument, a certain historical perspective is required. The original enactment of the Indian Copyright Act was in 1957, an era that predated technologically facilitated reproduction that was affordable. Thus concerns regarding widespread systematic and unregulated reproduction of copyrighted work were understandably absent. However, the potential of large-scale reproduction, with the development of photocopying machines, represents a crucial consideration while determining the contours of a post photocopier-era education exception, for it may diminish the incentives of publishers to publish high quality academic works, knowing that the same may be reproduced and used without any benefit accruing to them. Therefore any balanced reading of the law must be *contextual*, not a mere *textual* interpretation as in the instant case.

While a broader construction of 52(1)(i) may have been relevant to the mid twentieth century, the advent of the photocopier has created realities which legal interpretation must be sensitive to. In order to address *both* the rights of the copyright holder, and the concerns of affordable education in a developing country, a system of compulsory licensing is arguably the most suitable approach.

The premise of Justice Endlaw's conclusion, that the question of licensing only arrives upon affirming an infringement of copyright, results in a binary, which in the instant case failed to provide any protection to the copyright holder, for the limited exception under 52(1)(i) is interpreted as the governing norm. In light of the above, critics argue that

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<sup>7</sup> Kumar, A. (2017). *Delhi High Court strikes a fine balance between the right to copy and copyright*. [online] Scroll.in. Available at: <http://scroll.in/article/816791/delhi-high-court-strikes-a-fine-balance-between-the-right-to-copy-and-copyright> [Accessed 14 May 2017].

compulsory licensing may be a more suitable approach which balances interests by providing access to copyrighted works under 52(1)(i) but for a nominal fee.

The proposal of a licensing regime for educational uses of copyrighted works is perhaps the greatest concern of proponents of access to affordable education. First as discussed above, a plain reading of the law suggests that the same is unnecessary under the present copyright framework.<sup>8</sup> Second, licensing schemes have, in recent international experience, a poor record of ensuring that access remains affordable for Universities. In 2011, for instance, more than 25% of Canadian Universities opted out of blanket licensing agreements, in favour of open source materials and fair dealing copying exceptions, when faced with a license fee hike.<sup>9</sup> Similarly in 2013, all eight of New Zealand's universities were taken to the country's Copyright Tribunal when they refused to accept a fee hike upwards of 20%, proposed by the licensing authority.<sup>10</sup> Instances of this nature greatly weaken the desirability of licensing in India, given the concerns of access and affordability.

India's own limited experience with the Indian Reprographic Rights Organisation (IRRO), a society that represents the rights of copyright holders and issues licenses, has been mixed. In 2013, the Government of India refused to re register the IRRO due to its failure to comply with the latest copyright rules.<sup>11</sup> Critics of a licensing system have pointed out that while initial fees may be inexpensive, acknowledging copyright in the domain of educational use, would consolidate and broaden the exercise of property rights, thus facilitating claims of subsequent fee hikes, similar to the above international experiences. Acknowledging the lobbying power of the large global publishing conglomerates, only serves to add to the above apprehensions when negotiating a 'fair' and 'affordable' licensing framework. Another concern with a licensing system is that organisations like the IRRO do not hold rights to license all copyrighted works. Thus Universities would have to individually track down every

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<sup>8</sup> 52(1)(i) suggests that educational use does not amount to copyright infringement, which precludes, as pointed out by Justice Endlaw, the question of licensing, for users have a statutory right to the same.

<sup>9</sup> Lumsden, K. (2017). *Break-Ups Are Never Easy: York University Declines to Renew Blanket Copy Licence With Access Copyright*. [online] Iposgoode. Available at: <http://www.iposgoode.ca/2011/08/break-ups-are-never-easy-york-university-declines-to-renew-blanket-copy-licence-with-access-copyright/> [Accessed 14 May 2017].

<sup>10</sup> Lewis, J. (2017). *Universities face copyright action* [online] The New Zealand Herald [10 March 2013] Available at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10870331](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10870331) [Accessed 14 May 2017].

<sup>11</sup> Basheer, S. (2017). *Breaking News: IRRO Registration Refused!*. [online] SpicyIP, [9 December 2013] Available at: <https://spicyip.com/2013/12/breaking-news-irro-registration-refused.html> [Accessed 14 May 2017].

copyright owner to negotiate a license in such instances, a process that would significantly complicate and delay the creation of course packs.

The fundamental premise underlying the publishers' claims in the instant case is that of the adverse impact of photocopying on markets and revenue.<sup>12</sup> Publishers' incentives to sell, it is argued, are diminished if one can create a photocopy of an original work<sup>13</sup>, under a broad construction of the education exception, thus not requiring the purchase of the book, revenue from the sales of which would otherwise belong to the copyright holder.<sup>14</sup> While the economic logic of this argument is apparently sound, a critical perspective reveals a crucial flaw.

The copyright exception for the creation of course packs does not necessarily adversely impact the market for publishers' works. Students, who are the target users of these course packs, are not the target consumers of worldwide publishing houses.<sup>15</sup> Rather, universities and independent libraries are the primary consumers of academic titles used in course packs, for unlike the ordinary student, they can afford to purchase the expensive works. In the absence of a course pack containing an extract from a copyrighted work, a student would ordinarily refer to the same from the library, rather than purchasing an entire book to merely read a prescribed portion. In other words, the claim that reproduction for the purpose of making course packs adversely affects the market for academic titles is one that requires further corroboration in order to constitute a viable argument.<sup>16</sup> While the above discussion is conspicuous by absence in the analysis of Justice Endlaw, the Division Bench of the Delhi High Court acknowledged the above reasoning.<sup>17</sup> The latter judgement not only found that the course packs did not compete with the primary market of the book, but also

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<sup>12</sup> Reddy, P. (2017). *The publishing wars*. [online] Business Standard [9 September 2012] Available at: [http://www.business-standard.com/article/opinion/prashant-reddy-the-publishing-wars-112090900023\\_1.html](http://www.business-standard.com/article/opinion/prashant-reddy-the-publishing-wars-112090900023_1.html) [Accessed 14 May 2017].

<sup>13</sup> Gordon, W. and Watt, R. (2003). *The economics of copyright*. 1st ed. Cheltenham, UK: E. Elgar.

<sup>14</sup> *The Chancellor, Masters & Scholars of the University of Oxford & Ors, supra* note 1, ¶ 14. In the words of Justice Endlaw, the plaintiffs argued that, 'the only market for textbooks was the field of education, and if it were to be held that in the field of education textbooks could be copied, then publishers would not be able to sell and ultimately be compelled to shut down'.

<sup>15</sup> Basheer, S. (2017). *Delhi high court virtually busts 'property' rhetoric in the IPR narrative* [online] DNA. [22 September 2016] Available at: <http://www.dnaindia.com/analysis/column-delhi-high-court-virtually-busts-property-rhetoric-in-the-ipr-narrative-2257650> [Accessed 14 May 2017].

<sup>16</sup> Hudson, E., *Copyright and Course Packs: A Collision of Competing Values?* Oxford Intellectual Property Research Centre Speaker Series, England, (November 2016) Available at: [https://www.law.ox.ac.uk/sites/files/oxlaw/delhi\\_copying\\_eh\\_slides.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/delhi_copying_eh_slides.pdf) [Accessed 2 January 2017].

<sup>17</sup> *The Chancellor, Masters & Scholars of the University of Oxford & Ors, supra* note 1, ¶ 23.

went further to suggest that course packs may actually stimulate further reading which could potentially add to the market of the copyrighted work.<sup>18</sup>

Here it is important to note that a crucial element of this finding is that it is specific to the context of creating course packs within the course of instruction. Appreciating this specificity is crucial to acknowledging the damage to the market incentives of publishers, had all instances of photocopying by educational institutes been allowed. For example, when a university creates a course pack, its distribution to students does not damage publishers' market for the above-mentioned reasons, as long as the university is lawfully purchasing the book from the publishers. The publishers' market is only affected when the university, being the consumer in the market, no longer needs to purchase copyrighted work due to legalised photocopying. However this is not the case with the instant judgement.

The Court's reading of the phrase 'in the course of instruction' does not operate as a blanket exception in the field of education, one that would allow the university to legally purchase a photocopy of the original book, rather it only allows reproduction to the limited extent of teacher student exchange. In this manner the judgment adopts a position that is not only sensitive to the economic interests in the market for academic works, but also conducive to affordable education.<sup>19</sup>

### **III. IS THERE A QUANTITATIVE LIMIT TO REPRODUCTION?**

Amongst the many questions that the instant judgment has raised, perhaps the most important is regarding the extent to which the books may be reproduced for the purpose of making course packs. Given Justice Endlaw's approach, this question was unnecessary, for reproduction in the course of instruction amounted to no infringement altogether, which, in the absence of specific statutory provisions, precluded the question of how much of the text could be reproduced. Critical responses to the judgment elucidate divergent opinions. Some have suggested that the specific facts of the case, where the average percentage of entire book copied was 8.81%, were within an acceptable limit, so as to not engage the Court with the question. Others however have been more concerned about the Court's silence on the matter,

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<sup>18</sup> The Chancellor, Masters & Scholars Of University Of Oxford & Ors v Rameshwari Photocopy Services & Ors, RFA(OS) 81/2016 (Delhi High Court, 9 December 2016), ¶ 36.

<sup>19</sup> Keeping this very concern in mind it is important to ensure that a broad construction of the phrase 'course of instruction' does not extend to permitting universities to obtain reproductions of copyrighted works citing unaffordability. This would severely diminish publishers' incentives in the Indian market.

which leaves room to suggest that entire books could be reproduced within ‘the course of instruction’.

While the Division Bench judgement has clarified the matter, the answer is apparent from a closer reading of Justice Endlaw’s opinion itself, which clearly permits a qualified copying of entire books. This conclusion is based on the following reasoning. First, several of the works in dispute are edited volumes of essays by various authors, where each chapter constitutes an independent literary work protected under the Copyright Act. Thus reproduction of a chapter, despite being a small part of the entire collection, constitutes infringement of an entire copyrighted work, which the judgment permits insofar as it falls within the ‘course of instruction’. Second, the law only permits reproduction that is in the course of instruction. Thus even if an entire copyrighted work was to be reproduced for a course pack, it would have to be within the course of instruction, a threshold that considers requirements of the syllabus, lectures, and examinations. This has a dual effect of not only preventing the insidious reproduction of books exceeding the course of instruction, but also facilitating photocopying of entire works when they fall within the ambit of the threshold. This was clarified by the Division Bench, which observed that fairness in use must be determined upon whether the said reproduction was reasonably required for the purposes of instruction,<sup>20</sup> irrespective of its proportion. Thus, the instant case permits the reproduction of copyrighted works not on a quantitative, but rather a qualitative standard basis that may extend to the entirety of a copyrighted work.

#### **IV. INTERNATIONAL OBLIGATIONS**

Before concluding, it may be noteworthy to examine the interplay between the judgment of the Delhi High Court, and India’s obligations under the global intellectual property rights regime.<sup>21</sup> Responding to arguments based on international covenants in favour of the plaintiffs, Justice Endlaw remarked that ensuring municipal law’s consonance with international covenants was primarily entrusted upon the legislature, over which the Court cannot impose its own reading. However an equal consideration that perhaps escaped the Court was to interpret municipal law in a manner that does not derogate from international

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<sup>20</sup> The Chancellor, Masters & Scholars of University Of Oxford & Ors, *supra* note 18, ¶ 33.

<sup>21</sup> India is signatory to both the Berne Convention for the Protection of Literary and Artistic Works, 1886, and the Agreement on Trade Related Aspects of Intellectual Property Rights, 1995 (TRIPS).



covenants.<sup>22</sup> In the 1967 revision conference to the Berne Convention at Stockholm, the Indian delegation articulated demands in favour of wide exceptions to copyright for educational purposes. This included the right to use copyrighted works for educational purposes without providing the author any compensation, a demand that was categorically rejected, in favour of paying just compensation. This, along with similar reforms, was inserted in a Protocol appended to the Convention for the benefit of developing countries. The text of Article 9 of the Convention was also amended to include a three-pronged test, the satisfaction of which would permit unauthorised reproduction of copyrighted works.

The above history is important in the present context, for it elucidates the categorical rejection of a blanket exemption of educational use from copyrights, a position that Justice Endlaw's binary reading of the law appears to endorse. Article 9 of the Berne Convention, permits unauthorised reproduction insofar as the same "does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."<sup>23</sup> Based on the analysis in the previous section, it may be argued that the requirements of Article 9 are not jeopardised, for the unauthorised use of copyrighted material in course packs is unlikely to have a significant impact on the market for academic titles India. This justification however, is absent in the judgment as it dismisses the interpretative relevance of international obligations to the instant case.

## V. CONCLUSION

The decision of the Delhi High Court goes to the very heart of the central concern of any intellectual property rights regime, with the specific context being that of copyrights. Is the law primarily designed to protect the proprietary rights of creator, or is it a framework of *user rights*, which is sensitive to the concerns of creators' incentives? While the dominant intellectual property rights discourse would point to the former, the decision of the High Court tends towards the latter. Here it is crucial to appreciate that the Court arrived at its conclusion upon a plain textual interpretation of the law, thus implying that, the Indian legal framework *prima facie* does not entirely prescribe to the globally dominant paradigm of intellectual property rights. The judgement tends to affirm this by rejecting the dominant common law objective 'four factor test' of fair use,<sup>24</sup> in favour of an indigenous qualitative

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<sup>22</sup> Gramophone Company of India Ltd v Birendra Bahadur Pandey, (1984) 2 SCC 534.

<sup>23</sup> Berne Convention Article 1886, article 9 (2).

<sup>24</sup> *Folsom v Marsh*, 9 F. Cas. 342, (1841, C.C.D Massachusetts).

'reasonable nexus' test. Thus it lays the foundation for a progressive framework of user rights, from within the very text of the Indian Copyright Act, elucidating its sensitivity to concerns of access to affordable education in India.