

“From Photocopiers to Pirates: Study on Concept of fair dealing in Indian Copyright Law with brief Analysis of Du Photocopy Judgment”

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Abstract

Intellect is possessed by every human and thus even though novel and original intellectual property is awarded rights there may be grounds which allow exploitation of these protected works on certain grounds without having to undergo any formal legal process which is in the interest of the right holder. This article dwells into the concept of ‘fair dealing’ as enshrined in the Indian Copyright Act, which acts as an exception to the copyright protection and permits use of the protected work on certain grounds. A similar concept of ‘fair use’ is a part of the American copyright law, which is fairly similar to our own concept of fair dealing. Even with similarities there is inherent difference between the two concepts which becomes an issue to deliberate on. In contemporary times, the issue regarding this exemption becomes all the more potent in the backdrop of the controversy generated by legal action taken by the Oxford University Press, Cambridge University Press and Francis & Taylor against a small non-descript photocopy shop ‘Rameshwari Photocopiers’ located in the heart of Delhi University. This article seeks to dwell into the meaning and concept of fair dealing, analysis of the same in comparison to its American counterpart, and the analysis of the recent Delhi University Photocopy Judgment.

Keywords- *Fair dealing, Fair use, Indian Copyright Act, Rameshwari photocopy, Judgment.*

INTRODUCTION

There exist many ideas in the common. These ideas are universally available and accessible to all. The one who exercises his labor and skill to cull out an idea from the common and turn it into an object of utility or even an expression is who is rewarded. This reward takes the shape of intellectual property right which may either be a patent, copyright, trademark etc. Copyright protection in India is granted to original literary, dramatic, musical and artistic works; cinematograph films and sound recording¹. Once a copyright is granted, the holder is given certain exclusive rights like those of reproduction, performance, translation and adaption.² Any exercise of these exclusive rights by a person not granted a license³ constitutes infringement.⁴

A copyright serves both as a privilege and an incentive. It is a benefit in the way that it is a right that grants exclusivity of use to the owner of the copyright. It serves as an incentive to produce or create work that is worthy of this right. Either way, along with the owner of the copyright the society at large is also benefitted with the dissemination of the information that the copyright protects and allows use of only on certain conditions. The owner of a copyright enjoys a bundle of exclusive rights including the use, reproduction, licensing etc. of the copyrighted work. This constitutes his economic rights. An act is termed as infringement when the work of an author, is used by a person sans due permission. These rights are not absolute in nature. The statute provides certain exceptions, to which the defendant may take recourse in an infringement suit brought against him.⁵ These exceptions have been incorporated in order to protect the right to freedom of expression guaranteed under the Constitution of India.⁶ One of these many defenses is "fair dealing"⁷ against claims of infringement of copyrighted material.

¹Section 13, Indian Copyright Act, 1957 ("Copyright Act").

²Section 14, Copyright Act.

³License is granted under Section 30, Copyright Act.

⁴Section 51, Copyright Act.

⁵Section 52, Copyright Act.

⁶ Article 19(l) (a), Constitution of India. See: *Wiley Eastern Ltd. v Indian Institute of Management*, (1996) PTR 46 (Del).

⁷ Section 52(l) (a) and 52(l) (b), Copyright Act.

The term fair dealing has not been expressly defined under the US or Indian copyright law. Yet the essence of this concept roots from the judicially derived factors being listed under S. 52 of the Copyright Act 1957, that render certain acts not amounting to infringement. Thus, the concept of fair dealing reflects a limitation as well as a exception to the intellectual property right an author gets granted for his creative work.

The rationale for the exception lies in the fact that if an infringing use is such which benefits the public at large; this use should fall under the ambit of exception. Thus, such a defense would allow an honest and genuine member of the public to use the copyrighted work fairly without causing any commercial loss to the right holder. This defense vindicates the user from obtaining consent or license from the copyright holder. The exception, in broad terms, allows the use of protected works so that the intellectual property right does not come in conflict with the freedom of speech and expression of an individual

History

The inception of discussion can be traced back to the decision held in the case of *Gylesv. Wilcox*⁸, whereby the Court of Chancery in England conceived the notion of "fair abridgment". The United States uses the concept of fair use till date which differs somewhat from the concept of fair dealing which is used in India. This concept was introduced in India in the landmark case of *Macmillan and Company v. K. and J. Cooper*⁹. The concept of fair dealing is not defined per se in the statute but it follows the common law. Section 52 of the Copyright Act, 1957 provides the statutory framework to determine whether a use, in its truest sense is a fair use/dealing. The provisions of the statute identify certain types of uses such which qualify to be exempted and treated as fair dealing in India. In addition to the Indian statute, the Berne convention provides for fair dealing under Article 9 which states that-

“(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

⁸(1740) 26 ER 489.

⁹(1924) 26 BOMLR 292.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.”

All the member countries of WTO are obliged to comply with the Berne Convention on Copyright as well as the articles of TRIPS¹⁰. Thus the doctrine found its place in most of the territorial copyright legislations of the member countries. Even so, TRIPS requires the exception to pass through a ‘three-step test’ as provided under article 13, i.e. “exception must be ‘special; must not conflict with normal exploitation; and it must not unreasonably prejudice the legitimate interests of right holders”. In a way, the TRIPS equation of fair dealing is deemed to be on the line of the US concept of fair use. There are different approaches take to reach the destination. Some routes are rigid while the others have embraced the concept with open arms, not restricting the scope of fair dealing. For instance, the Indian and UK copyright laws are deemed to have a narrow and restricted scope with respect to fair dealing, having an exhaustive list of actions/uses that constitute fair dealing. US on the other had provides a wide and open ambit for the fair use of a copyright work¹¹. India and U.K. follow a strict framework with regard to what constitutes as fair dealing, while U.S. does not have a straight jacket formula but is open for interpretation and works along certain guideline factors which aid in determination of the extent of fairness of the work.

"Fair Use" and "Fair Dealing" Compared

Fair dealing acts as an exception as well as a defense in cases of infringement of the copyright. Even though the two words are conceptually the same, yet the ambit of scope of the two is what creates the difference. U.S has a wider ambit of uses, in the sense that it is not restricted to

¹⁰ Ficsor M, How much of what? Three-step test and its application in recent WTO dispute settlement cases, RIDA, 192 (2002) 111-251

¹¹ Nimmer David, Fairest of them all and other fairy tales of fair dealing, Law & Contemporary Problems, 66(2003) 263-28

specific purposes.¹² According to Section 107 of the US Copyright Act, 1976, there are four factors for determining 'fair use', viz., (i) purpose and character of work; (ii) nature of copyrighted work; (iii) amount and substantiality of the portion used; (iv) effect on market value of the original.¹³ Fair dealing, which is the Indian counterpart, works on an exhaustive list of uses which are considered as exception under the Copyright Act. Private uses such as research, criticism, review, reporting etc are allowed under the Act.

It is contested that the American version of the concept is not in line with the provisions of TRIPS¹⁴ in the sense that it confines the limitations or exceptions to the Berne three-step test.¹⁵ This three step test lays down the requirements of the reproduction/use may be permitted –

- i. In certain special cases
- ii. It must not conflict with the normal exploitation of the work and,
- iii. Must not unreasonably prejudice the legitimate interests of the copyright-holder.

The accusation against Section 107 is that the first and the third step requirements are not satisfied due to its open-ended guideline nature.¹⁶ The open ended scope of fair use was kept considering the rapidly advancing technology in today's era. Keeping the changing scenario in mind the Courts should have the leverage of deciding disputes on a case to case basis.¹⁷

The fair dealing concept, different from fair use, was inserted in the UK legislation in 1956 and retained in 1988¹⁸. The statute permits fair dealing for three purposes-

1. Research or private study
2. Criticism or review; and

¹² Griffiths, J., "Preserving Judicial Freedom of Movement-Interpreting Fair Dealing in Copyright Law", [2000] IPQ 164. See also: Copinger and Skone, J., Copyright, Volume I (Sweet & Maxwell, London: 15 edition, 2005) 481.

¹³ For a good analysis of American law on fair use, see: Fisher III, W.W., "Reconstructing the Fair Use Doctrine", 101 Harv. L. Rev. 1659 (1988).

¹⁴ Article 13, TRIPS (Marrakesh Agreement), 1994.

¹⁵ Article 9(2), Berne Convention for the Protection of Literary and Artistic Works. See: Heide, T., "The Berne Three-Step Test and the Proposed Copyright Directive", 21(3) EIPR 105 (1999).

¹⁶ Ricketson, S., "WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment", 5 April, 2003, WIPO Doc. SCCR/9/7, p. 67-69.

¹⁷ *Lewis Galoob Toys v Nintendo, Inc.*, 964 F.2d 965. See also: Weinreb, L.L., "Fair's Fair: A Comment on the Fair Use Doctrine", 103 Harv. L. Rev. 1137 (1990).

¹⁸ Section 29, 30, Copyright, Designs and Patents Act, 1988 ("CDPA").

3. Reporting current events.

Determining what actually constitutes as 'fair' in fair dealing is a herculean task. Even with the set criteria and guidelines, it is very subjective in nature to conclusively determine whether or not a particular use in that particular scenario constitutes a fair dealing. Similar principles to assess 'fairness' have been followed in India.¹⁹ Additional restraints have been positioned in the UK legislation, to make it TRIPS compliant. In lieu of the same, the Act was amended, which further limited the fair dealing for research or private study in the sense-

1. that it must be for a non-commercial purpose, and
2. That it must be accompanied by sufficient acknowledgment.²⁰

The Indian legislation also takes after the fair dealing concept, limiting the scope of the concept and restricting the uses for a specific number of purposes. The law on fair dealing has not yet been subjected to exhaustive judicial scrutiny and thus in such a scenario the smarter approach is to follow the UK concept to understand the Indian context.

Legislative Context of Fair Dealing in India

The doctrine of fair dealing is rooted in sec 52 of the copyright act in India. This was derived from the English Copyright Act and applied in India long before the act was expressly applied, in the case of *McMillan v Khan Bahadur Shamsul Ulama Zaka*.²¹ In 1914 the India Copyright Act was passed but even so, fair dealing was for the very first time statutorily introduced in 1914 as a mere reproduction of Section 2(1)(i) of the UK copyright Act of 1911. The current provisions in India governed by the Indian Copyright Act, was passed in 1957. This was a more independent and self-contained law²² even though a number of provisions were borrowed from the UK Copyright law. The 1957 Act broadened the scope of fair dealing bringing under its ambit of protection purposes of radio summary or judicial proceedings.²³ Since 1957, there have been

¹⁹*S.K. Dutt v Law Book Co.*, AIR 1954 All 570; *Civic Chandran v Ammini Amma*, (1996) PTC (16) 670 (Ker).

²⁰ Section 29, CDPA, amended by Section 9, Copyright and Related Rights Regulations, 2003.

²¹ (1895) ILR Bom 557 in Lal, *The Copyright Act*, 3rdedn(Law Publishers India, Allahabad), 1995, p.6.

²²Statement of Objects and Reasons, Indian Copyright Act, 1957.

²³Narayan P, *Copyright and Industrial Designs*, 3rdedn (Easter Law House, Kolkata), 2002, p.8.

three major amendments in the act specifically section 52. The latest was in the year 1999 wherein issues regarding computer programs were sought to be addressed.

The intention of drafters of the copyright act transparently reflects the recognition of building a copyright regime on the bedrock of enhancing public consciousness with regard to the rights and obligations of the authors. The amendments subsequently made, were such in nature so as to accommodate the developing technology and also to keep in line with the international obligations undertaken.²⁴ The introduction of fair dealing, to the act has been done so as to create a balance in consonance with the emerging technological challenges.

In *Eastern Book Company v DB Modak*²⁵ regarding the question of fair dealing the Supreme Court observed that the two positions that prevailed i.e. ‘sweat of the brow’ and ‘modicum of creativity’ are extreme in nature with the threshold of being lower than required and the other being more than necessary. Thus, not every outcome of labor is copyrightable. The work which involves some degree of creativity and intellectual effort deserves copyright protection.

Judicial Treatment of Fair Dealing

The Indian Copyright Act lays the responsibility of proving the existence of defense on the user of the copyrighted work once the owner of the copyright establishes prima facie infringement on pretext of substantial copying of expression. Even so, in India, prima facie infringement is not always established before consideration of the application of fair dealing begins.²⁶

The very first issue is the definition of fair dealing which is not expressly laid down in the act and thus the courts rely on the interpretation that emerged in *Hubbard v Vosper*²⁷. Herein Lord Denning said-

“It is impossible to define what is ‘fair dealing’. It must be a question of degree. First you must consider the number and the extent of quotation and extracts....then you must consider the use made of them...but after all is said and done, it must be a matter of impression.”

²⁴ Ibid.

²⁵(Civil Appeal No. 6472 of 2004)

²⁶*Civic Chandran v Ammini Amma*, 1996PTC 16 670.

²⁷(1972) 1 All ER 1023 p. 1027.

Section 52 enumerates purposes which are exhaustive in nature in the sense that any use not falling within the enumerated purposes is considered to be an infringement.²⁸ Even with an exhaustive list of purposes, it is not possible for the courts to apply a straight jacket formula in all situations. Every situation demands through understanding of the facts and circumstances and accordingly the law is applied so as to not defeat the intent of the provisions. The Courts have conventionally expressed and applied three important factors while deciding the matters regarding the issue of fair dealing.

1. Amount and Substantiality of the dealing

For an infringement to have happened there must be ‘substantial’ portion of the copyrighted work that has been infringed. The logic that follows here is the more the amount of work taken, the less fair the dealing is. In *RG Anand v Deluxe Films and Ors*²⁹, the Supreme Court of India not only embraced the concept of idea-expression dichotomy but also held that some ideas being common are bound to be similar to a certain extent. In such a situation the courts are required to look into the substantial portion of the work to determine whether or not infringement took place. For a case of infringement to be proven the copied portion in question should constitute a substantial and material reproduction of the copyrighted expression and not the idea per se. Thus the question of fair dealing will only arise when the infringement of the expression of idea and not the idea has taken place.

Thus the issue of substantiality lies in whether or not there has been substantial portion that has been infringed and whether the use which is alleged to be an infringement is fair or not.³⁰ The Indian courts determine these on a case to case basis and apply both quantitative and qualitative test of substantiality. Thus the permissible quantum of portion extracted or reproduced will be dependent on individual case facts.³¹ Intention of the alleged infringer is an important factor for

²⁸ *Blackwood and Sons Ltd and Others v AN Parasuraman and Ors*, AIR 1959 Mad 410 Para 84 and *Civic Chandran*, 1996 PTC 16 670.

²⁹ AIR 1978 SC 1613

³⁰ Lape L G, Transforming fair use: The productive use factor in Fair Use Doctrine, Albany Law Review, 58 (1995) 677-724

³¹ *Civic Chandran*, 1996 PTC 16 670 and *ESPN Stars Sports v Global broadcast News Ltd, and Ors*, 2008 (36) PTC 492(Del) Para 34.

deciding the fairness of the work used but it is not the sole decisive factor for determining the same.³²

2. Purpose Character and commercial nature of the dealing

Section 52 of the Copyright Act enumerates an exhaustive and inclusive list of uses that fall within the ambit of fair dealing. If the purpose is one of those not listed in the statute, it is not considered to be fair.³³ Mainly the purposes constitute private study, research, criticism and review.³⁴

The words ‘private study or research’ were replaced by the Copyright (Amendment) Act, 1994 to ‘private use including research’. The intention here to include this has been to provide defense to one, who while fairly dealing with a copyrighted work has incurred the wrath of having infringed the same. Private study dealing should not be published or should not be in commercial nature. The Act is quiet on the implication of ‘research’ yet the Courts in Blackwood case have accepted the oxford dictionary meaning to understand the term. With respect to ‘review’, as per the Indian courts, it is the summarized or condensed original work so as to bring forth a fair idea about the work to the third person.

The American courts have further added the aspect of ‘transformative character of use’³⁵ which implies that a mere mechanical change in the work does not carry the elements of a transformation³⁶. The Indian court has pondered on the same which was reflected in the judgment in the case of R.G Anand³⁷. The court here held that “where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.” The question regarding writing guides was examined in the case of Ramaiah v K Lakshmaiah³⁸ wherein the courts were cautioned to bear in mind that if the defendants have not independently contributed to the work, the use will not be a fair use and mere copying will amount to infringement. The courts have taken a soft approach to

³²*Blackwood Case*, AIR 1959 Mad 410 Para 84.

³³ *Ibid*.

³⁴ AIR 1959 Mad 410 Para 86.

³⁵*Sony Corp of America v Universal City Studios* 464 US 417, 104 S Ct 774 (1984).

³⁶*Syndicate press of University of Cambridge v Kasturilal and Sons*, 2006(32) PTC 487 (Del) Para 7.

³⁷*Chancellor Masters Case*, 2008(38) PTC 385 (Del) Para 34.

³⁸1989 (9) PTC 137.

this particular issue since the purpose of guides is to help students. For this reason it falls under the fair dealing exception³⁹.

3. Effect on potential market: likelihood of competition

This factor is a weak consideration in India. Courts have endorsed ‘likelihood of confusion’ concept in *ESPN Stars Sports v Global Broadcast News Ltd and Ors*⁴⁰, stating that if the two works convey the same meaning there is a likelihood of confusion that may be caused and thus the same will be unfair. An important factor to consider here is the ‘impression of the work’ on which the allegation of infringement is based. If the impression the third person is such that it causes confusion between the two works, it is not fair.

What Direction Are the Courts Moving in Today?

The Courts were cautioned long back in the *Blackwood* case to not apply the American law in India. The number of fair dealing cases has been handful in India. The Indian Copyright Act even though has an exhaustive list enumerating what fair dealing is, yet there are no conclusive factors laid down to determine fair dealing. In such a scenario the American system of analyzing the factors provide a skeleton or framework for the analysis of the same.⁴¹ The American approach requires all the four factors to be applied cumulatively but the Indian courts, contrary to this approach have applied the same in isolation as per the requirement of the case.

1. Purpose of dealing- Even though the Courts utilize the American approach, yet they stand loyal to the language and intent of the statute and thus follow a restrictive approach by sticking to the list of uses/purposes given in the act itself.
2. Nature of the copyrighted work- The courts in the case of *Civic Chadran*⁴² looked into this factor and stated that nature of the work implies that certain events, incidents etc. will be common to both the copyrighted and the alleged infringed work where the latter has no intent to copy or imitate the former. The courts incidentally ended up

³⁹ *V Ramaiah v K Lakshmaiah*, 1989 PTC 137.

⁴⁰ *ESPN Stars Sports v Global broadcast News Ltd, and Ors*, 2008 (36) PTC 492(Del) Para 17.

⁴¹ Section 107 of the US Copyright Statute, 17 USC 107

⁴² 1996 PTC 16 670

- invoking the ‘scene- a- faire’ doctrine which implies ‘certain scenes which necessarily result from identical situations’ and do not constitute as infringement.⁴³
3. Substantiality- this factor is of least significance in the US⁴⁴ since the portion of work used can only be a considering factor when analyzed with the other factors. Substantiality alone cannot prove whether or not it is a case of fair dealing. India has also followed a similar approach and has at times in various cases held that the determining factor would be how substantially the work has been copied which would negate the fairness.
 4. Effect of use upon the potential market- This factor, in the US is considered to be the single most important factor to determine fair use. India does not lay the same amount of importance on this factor.

Analysis of Rameshwari ‘Photo Copy’ Judgment

The real issue regarding how fair the provision of fair dealing is arose when a suit was filed before the Delhi High Court in 2012. An order was passed in September 2012, which directed Delhi University to examine the plaintiff’s proposal of obtaining license from Reprographic Rights Organization such as IRRO for the preparation of course packs. Rameshwari photocopy shop in the campus of Delhi University was restrained in October 2012, via order of the Court from making or selling course packs until final disposal of the application for interim relief.

The order of the High Court passed in September 2012 was the very first issue that was considered while determining the question of whether or not making course packs by defendants amount to infringement of copyright held by the plaintiffs. With respect to the contention of the defendant regarding the question of taking license, the court stated that the need to answer this question arose if the Court comes to the conclusion that the act of making of course packs is not covered under Section 52 of the Copyright Act and consequently, constitutes infringement. Hence the Hon’ble court accepted that fact that it was needless for the defendants to bargain for

⁴³*Reyher v Children’s Television Workshop*, 533 F 2d 87, 92(2d Cir 1976).

⁴⁴Giuseppina D’ Agostino, Healing fair dealing? A comparative copyright analysis of Canada’s fair dealing to UK fair dealing ad US fair use, *McGill Law Jornal*, 53 (2008) 309-363.

license for making the course material packs if the law already provides them with the right to do the same.

The court noted the difference between issuing of books by the library to general public or students and photocopying of these books. With regard to the former issue the Court stated that this act falls well within the ambit of exhaustion principle which is the genesis of libraries as well as educational institutions. With respect to the latter, the Court stated that the phrase “*to issue copies of the work to the public*” under Section 14 (a) (ii) cannot be interpreted as “*making copies of the work*”. Therefore, the Court stated “*The defendant No.2 University thus, though entitled to issue the books, published by the plaintiffs and purchased by it and kept by the defendant No.2 University in its library, to whosoever is entitled to issuance of the said books from the library, per Section 14(a)(i) and Section 51(a)(i) would not be entitled to make photocopies of substantial part of the said book for distribution to the students and if does the same, would be committing infringement of the copyright therein.*”.

Further the court moved into the interpretation of Section 52 of the Copyright Act, Section 52 lists out certain acts that are not to be considered as infringement of copyright. *The Court stated that*, “Similarly here, to hold that in spite of the legislature having declared the actions listed in Section 52 to be not amounting to infringement, the same have to be viewed putting on the blinkers of being infringement would amount to holding that the Copyright Act which allows actions listed in Section 52 to be done without the same constituting infringement and consequences thereof not constituting infringing copy, cannot be done to the extent permitted by the language of Section 52”. Thus the court stated that “the rights of persons mentioned in Section 52 are to be interpreted following the same rules as the rights of a copyright owner and are not to be read narrowly or strictly or so as not to reduce the ambit of Section 51, as is the rule of interpretation of statutes in relation to provisos or exceptions.” Then the Court considered whether the making of course packs falls under one of the sub-sections of Section 52. While the Court noted that the same would not fall under Section 52(1)(h) or 52(1)(j), it would fall under Section 52(1)(i).

A student copying contents of a book by hand would also fall under the ambit of fair dealing and would not amount to infringement. The photocopy shop did the same to lessen the burden of the students from hand copying the material of the books and xeroxing it for their personal use. Hence, the Court stated, *“When the effect of the action is the same, the difference in the mode of action cannot make a difference so as to make one an offence.”*

The Court held “that it was irrelevant whether DU was making the course packs by itself or had licensed it to a contractor. As long as the impugned act was protected under Section 52, it was irrelevant whose hands did the photocopying and the making of the course pack, whether it is individual students, the educational institutions or a licensee such as Rameshwari”. Rameshwari, as per the Court was in no way a commercial threat or competition of the Plaintiff’s and was merely providing access to material which otherwise would cost heavily to the students considering the prices of the books in question. Such an exercise was only done to provide material at cheaper prices and not with a commercial motive. Additionally, the Court held that *“No law can be interpreted so as to result in any regression of the evolvement of the human being for the better.”*

The nature of the copy right work has also been clearly explained by the Delhi High Court: *“Copyright, especially in literary works, is thus not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to increase and not to impede the harvest of knowledge. It is intended to motivate the creative activity of authors and inventors in order to benefit the public.”*

Considering the socio-economic condition of the student population at large and the advancement of technology which cannot force one anymore to copy pages from books from a library manually the Court held that the actions of the defendant did not amount to infringement, that no trial was required and that suit was dismissed.

Recommendations on the Issues left Unaddressed

Even though the judgment did bring a sigh of relief to students specially but there were some issues that the court forgot to take notice of. These issues should have been addressed for a more appropriate and rationale judgment which would've further strengthened the concept of fair dealing in India.

Firstly; the court does not answer either the question of *whose* numbers as to the quantum of photocopying are accurate, nor does it answer the question of whether such copying is *substantial*. Indeed, the question of what *effect* such copying would have on the Defendants' fair dealing defense should be addressed to prima facie make out what copying is substantial copying. Not only is the percentage of the work photocopied, frequently used as a legal benchmark to distinguish between copying that is infringing and non-infringing⁴⁵ but also it would have been useful to have a finding on this issue, so as to interact with the Plaintiffs' contentions regarding the likelihood of damage to their business model.

Secondly; the court has left unaddressed whether the Defendants' acts were commercial in nature. Yet, the *facts* themselves have not been examined by the judge despite the issue being extensively contested by the parties. The Defendants, perhaps aware of the difficulty in circumventing the fact that the students *were* being charged for course packs, looked to distance themselves from the commercial nature of the transactions. At one stage, the Defendant University offered to undertake not to photocopy with commercial motive.

The Plaintiffs contended that the course packs were not unconnected photocopies – they were being sold like books. They suggested that the Defendant photocopier was charging a rate *higher* than market price for the course packs, and that the Defendant University had every incentive to have its licensee do better business. A finding on this issue would have provided a standard for judging the boundaries between types of fair dealing which are commercial to some degree. A preliminary finding would have sufficed, while more evidence on these competing claims could have awaited trial.

⁴⁵The Chancellor, Masters & Scholars of the University of Oxford & Others v. Rameshwari Photocopy Services & The University of Delhi, 233 (2016) DLT 279

Thirdly; the judgment is unhelpful in offering even a basic sketch of the economic factors that govern the Indian market for academic texts. It is left to the reader, then, to cobble together a hopeful approximation of the judge's view of the economics at work.

There can be little disagreement over the fact that quality editing, exercising and leveraging sales and distribution networks and author commissions and royalties are steep expenses for publishers. Publishers recoup this outlay in India predominantly through sales and licenses. Presently, the overwhelming majority of the market for academic texts, especially foreign texts, is academic institutions, and not individual students. Mass photocopying, the stock-in-trade of photocopiers like the first Defendant in this case, has two effects. First, it ensures that a book can be transferred from the published page to the photocopied page with no loss of academic quality. Second, it makes the use of these books fundamentally and aggressively non-rivalrous. For instance, if there are two users who want to access an extract from a single copy of the book at the same time, aside from the amount of time taken to photocopy the extract, there is no impediment to one book serving the academic needs of both users. Further still, if that extract is included in the course pack, the need of either user for the book disappears entirely and permanently.

From here, it is no hardship to conclude that if academic institutions are permitted to make, distribute and sell multiple copies of an individual book, it makes them less likely to be repeat purchasers. This state of affairs protects everyone but publishers and authors.

It protects the licensed photocopiers themselves. In exchange for the licensee fees, they are given access to a defined (and frequently growing) demand for course packs to be charged at set rates beyond the university's maximum free page allowance, in addition to *ad hoc* photocopies which are charged at market rates. It protects the students as well, since they do not need to spend on purchasing books. They are given access to course packs either as handouts or at fixed rates per page. However, for the publishers (and, filtered through the sieve of royalties, the authors), the loss occurs in two ways. *First*, it kills the incentive of academic institutions to purchase multiple copies of the same title. Legalizing mass photocopying means that institutions that would have purchased, say, twenty copies of a title, can now purchase as few of those titles as are

necessitated by the limitations on the number of photocopying facilities available to its academic users. For this not to occur, it needs to be established that there is a unique, irreplaceable value to reading a relevant extract from an original book rather than from the same thing in a course pack.

Second, it also dissolves any remaining reason for the few individuals who were previously purchasing these titles from the publisher to continue doing so. This is because what they need of these texts to fulfill their academic obligations is offered to them for a tiny fraction of the cost of the book. Once again, to disprove this, some unique value to owning and enjoying exclusive rights over an original text (aside from merely convenience, since a user does not need to photocopy an extract from a book she already possesses) must be demonstrated. The only other room to argue that the publishers' economics will not be affected is to assert – and an assertion is all it can really be – that the demand of academic institutions or individuals (or both) for original titles will not fall because course packs are not exhaustive of an academic user's need for these titles. If multiple copies of these titles are needed in academic libraries or are likely to be purchased by individuals so that they can access parts of the text that are *not* extracted in course packs, it could be said that the fall in demand may be offset to a degree.

However, for this to be tenable, there needs to be a sharp rise in such putative users, something the Indian higher education system to much consternation, clearly lacks.⁴⁶ Even if this becomes a front-and-centre goal of the system, it is hardly fair to expect publishers and authors to design their economic sustenance around the assumption that Indian students will want to read beyond what they are required to for class.

Finally, much has been made of the motivations of publishers in pursuing actions like this. Understandably, there are concerns over the whys and wherefores of how an organization like IRRO would negotiate a deal between publishers and academic users. (An IRRO license of course is, by the Plaintiffs' admission, their best case scenario in this case.) However, this is still a conversation on *how* rather than *whether* a licensing agreement can be administered. It cannot be used to justify throwing out the Plaintiffs' case entirely because all photocopying in the course of academic instruction is fair dealing, not worthy of recompense.

⁴⁶S Deshpande, *Copy-wrongs and the Invisible Subsidy*, The Indian Express, October 7, 2016

Beyond this, the only advancement offered for the Defendants' position has been that the Plaintiffs, being locked out of what is effectively a lucrative second seller market, want a share of the pie. Even if true, set against the losses likely in the *first* seller market discussed above, surely this is a question that falls to be determined on a spectrum of economic viability rather than being cast as a lazy allegation, which simply plays to the "profit-maximizing publisher" stereotype.

Conclusion

US are driven by the rationale to prioritize public interest whereas UK chose a more mature licensing system. India, in line with the overall socio-economic status, should come up with guidelines for adopting a more "fair-use" biased model in India. Had India followed a fair use approach, the Rameshwari fiasco would not have happened. There has been no decision on what is the permissible limit of copying i.e. how much copying would be allowed under the exception. Unlike the U.S Court which has followed a more exhaustive approach towards the exemption of fair dealing, Indian courts also need to decide, if not a pigeon holed formula, but on the substantiality of copying and what would substantial mean for the Courts to be able to decide in a proper manner.

The present approach is fairly rigid and should not be followed considering the pace with which technology and society today is advancing. Restricting the scope of IP in its initial expansion phase is only going to defeat its purpose of existence. Some scope for judicial creativity balanced out with not allowing misappropriation of another's work in lieu of freedom of speech and expression should be maintained. The authors do not endorse doing away with the present provisions but the inclusion of flexibility of the fair use provisions. Fair dealing should be allowed for purposes beyond the statute as well and the rigid approach should be done away with so as to include space for contingencies, which may prove to be in the interest of the public at large.