

OCTOBER 2016

## COPYING EDUCATIONAL MATERIALS IN THE COURSE OF INSTRUCTION DOES NOT AMOUNT TO INFRINGEMENT

### 1. INTRODUCTION

In its recent judgment, the Delhi High Court has held that the compilation of photocopies of various copyrighted material used “*in the course of instruction*” by teachers and educational institutions, does not amount to an infringement of copyright.<sup>1</sup>

The Court, while dismissing the suit, held that compilation of photocopies or the act of photocopying course material is an integral part of any education and to hold the same to be an infringement would be tantamount to interpreting the law resulting in the regression of the evolvement of human beings for the better.

### 2. BACKGROUND

The suit was filed by five foreign publication houses, namely Oxford University Press, Cambridge University Press, United Kingdom, Cambridge University Press India Pvt. Ltd., Taylor & Francis Group, U.K. and Taylor & Francis Books India Pvt. Ltd., (together, the “**Plaintiffs**”) in 2012 against Rameshwari Photocopy Services (“**Defendant No. 1**”) and the University of Delhi (“**Defendant No. 2**”).

Defendant No. 1, ran a photocopy kiosk operating in the premises of Defendant No. 2, assisting students to make and share copies of resource books and references included as part of course curricula.

A permanent injunction was sought for restraining the Defendants from infringing the copyright of the Plaintiffs in their publications by photocopying, reproducing and distributing copies of substantial portions of the Plaintiffs’ publications and circulating the same by compiling them into course packs.

By an interim order passed in October 2012, Defendant No. 1 was restrained from making and selling course packs and re-producing the publications of the Plaintiffs (or substantial portions thereof) by compiling the same either in book form or in a course pack, until the final disposal of the application for interim relief.

While the Plaintiffs claimed copyright infringement by the Defendants, the Defendants claimed that the same was a “*fair use*” of the works within the meaning of Section 52 (1)(i) of the Copyright Act, 1957 (“**Act**”).

The Defendants contented that the practice of photocopying itself was practised in all universities in the world for use in research and for use in the classroom by students and by teachers and that the same were recognised by the Act.

<sup>1</sup> Judgment: The Chancellor, Masters & Scholars of the University of Oxford & Ors. Versus Rameshwari Photocopy Services & Anr.  
Ref: CS(OS) 2439/2012, I.As. No. 14632/2012 (of the plaintiffs u/O 39R-1&2 CPC), 430/2013 (of D-2 u/O 39 R-4 CPC) & 3455/2013 (of D-3 u/O 39 R-4 CPC).

It is pertinent to note that essentially, the principle of “*fair use*” provides for reasonable or fair copying of copyrighted content for certain purposes, without acquiring permission from the copyright owner.

Section 52 of the Act provides a list of “*fair use*” exceptional acts in India. Such limited copying does not amount to copyright infringement under the Act. Copying for educational use is one of the fair uses for which copying is allowed.

### 3. ISSUES

The main issues in the suit were as follows:

- (a) Whether the making of course packs by the Defendants amounted to the infringement of the Plaintiffs’ copyright under Section 51 of the Act (“**Issue 1**”);
- (b) Whether the making of course packs by the Defendants fall under Section 52 or any of its provisions and exceptions (“**Issue 2**”);
- (c) Whether the action of Defendant No. 2 in allowing Defendant No. 1 to make photocopies and to supply photocopies to students by granting it a license to do so, would be tantamount to infringement by Defendant No.1 or Defendant No.2 (“**Issue 3**”); and
- (d) Whether there is a contravention of the Berne Convention and TRIPS Agreement in permitting the Defendants to continue with the act of making and distributing copies of the Plaintiffs’ copyrighted works (“**Issue 4**”).

### 4. JUDGMENT

The Court, deciding in the Defendants’ favour, dismissed the suit and held that the acts of the Defendants did not amount to infringement of the Plaintiffs’ copyright. The Court’s observations and conclusion on each of the above issues are summarized as follows:

#### 4.1. Issue 1

In deciding the first issue, the Court held that the making of course packs by Defendant Nos. 1 and 2 did not amount to an infringement of the Plaintiffs’ copyright.

The Hon’ble Court discussed in detail the interpretation of the provisions under Sections 2(m), 14, 16, 51 (a) and 52 of the Act as well as the object behind the same.

The Court noted that Section 51(a)(i)<sup>2</sup> does not have the element of commercial or monetary gain to the infringer, when he does the infringing act in relation to a copyrighted work. The Court also observed that unless an act of infringement is specifically listed in Section 52, it would not be considered an exception to infringement on the basis of its “*fair use*” aspect.

Having said that, the Court did provide a liberal interpretation of the Act and took a view that a balance is required to be maintained between the owner of the copyright in protecting its works on the one hand and the interest of the public to have access to such works on the other hand.

<sup>2</sup> Section 51: Copyright in a work shall be deemed to be infringed- (a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act-

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright

## 4.2. Issue 2

The Court, while deciding the second issue, discussed in length Section 52 and the applicability of various listed exceptions to copyright infringement under the same.

In particular, it noted that Section 52(1)(a) provides for a general exception to copyright infringement and therefore, ruled that the same will not be applicable in the present scenario. This was for the reason that there are specific clauses, namely, Sections 51(1)(h), (i) and (j), covering acts in relation to education. The Court specifically pointed out that clause (h) is specifically in relation to '*non-copyright subjects*', and therefore, held that the same will not be applicable to the matter as well. Nobody argued that clause (j) will be applicable as it is specifically in relation to '*performance*' of a copyright subject.

The Court further observed that copyrighted works used by teachers in educational institutions "*in the course of instruction*" would include reproduction of any copyrighted work, and the same will be an exception to copyright infringement under Section 52(1)(i)<sup>3</sup>.

Widely interpreting the word '*teacher*' in the clause, the Court reasoned that Defendant no. 2 was reproducing the copyrighted works on behalf of its teachers and hence, held that the clause covered the present case.

In this regard, reliance was also placed on *Longman Group Ltd. vs. Carrington Technical Institute Board of Governor* (1991) 2 NZLR 574 wherein, it was held that in its ordinary meaning the words, "*course of instruction*" would include anything in the process of instruction and that so long as the copying forms part of and arises out of the course of instruction, it would include preparation of material to be used in the course of instruction. Once reproduction (photocopy) is expressly permitted under Section 52, no limitation should be placed thereon.

The Court also commented that the law must change with the times and in this day and age when students have access to modern technology such as camera phones and photocopying machines, they should not be deprived of the same.

Further, if the libraries of universities issued books to students who would thereafter photocopy the relevant portions themselves, either by hand or by taking photocopies, such an act would not constitute infringement, coming well within the purview of fair use.

Therefore, by using the same analogy, the acts of the Defendants in making such photocopies available to its students, owing to the limited number of books, the price of the same and the possible damage to such books due to repeated photocopying by students, could not be held to be an infringement.

Relying on the judgment in, *The Williams & Wilkins Company vs. The United States* 487 F.2d 1345 (Ct.Cl. 1973), the Court said:

*"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".*

<sup>3</sup> Section 52 (1) The following acts shall not constitute an infringement of copyright, namely:

(i) the reproduction of any work

(i) by a teacher or a pupil in the course of instruction; or  
(ii) as part of the questions to be answered in an examination; or  
(iii) in answers to such questions;

The Court, hence, held that the action of the Defendant No. 2 making a master photocopy and distributing the same to the students would not constitute infringement of copyright in the said books under the Act.

#### 4.3. Issue 3

The Court held that the acts of Defendant No. 1 in compiling such course packs and supplying the same for a charge did not amount to infringement. The Court further drew parallels with the Bar Association library within the premises of the Court where Advocates, instead of carrying voluminous books from their residence and offices to the Courts, would simply have the relevant portions photocopied from the books in the library.

Initially the same was done by advocates issuing the book from the library and taking it to the photocopier outside of the court premises. However, for the convenience of advocates and with a view to avoid books being taken out of the library, the photocopier was granted a license to operate within the court premises.

The Court held that *“merely because the photocopying is done by the person desirous thereof himself but with the assistance of another human being, would not make the act offending.”*

Additionally, it cannot be said that Defendant No. 1 was working commercially as the price per page was 75 paise which included operating costs incurred by the Defendant No. 1 and was in no way a price which competed with the price fixed by the Plaintiffs.

#### 4.4. Issue 4

The Court, keeping in mind the object of the Berne Convention and TRIPS Agreement, ruled that India, under various international covenants had the freedom to legislate to what extent the utilization of the copyrighted works for teaching purposes was permitted, stressing that the act of copying was *“justified by the purpose”* and did not *“unreasonably prejudice the legitimate rights of the author”*.

In this context it should be noted that Indian legislation is enacted, keeping in mind such international covenants. Therefore, if Indian legislation, in the present factual context, had not imposed any such limitation, the Court could not impose such limitations on its own accord. The Court was also of the opinion that the Copyright Act of India could not be judged on the bedrock of Copyright Acts of other countries as the context and social backgrounds were different.

#### IndusLaw View:

The judgment passed by the Delhi High Court could have far reaching consequences: it essentially prioritizes a social objective ahead of foreign right holders, on the assumption that *“fair use”* can be demonstrated.

The Court has shown its reluctance in taking a strict view of the Act, allowing the *“fair use”* exception in support of the photocopier and the university, and considered their actions to be reasonable and proportionate in the context of educational use.

By doing this, the Court has tried to draw a balance between the rights of intellectual property holders and the public interest in the interest of dissemination of information and imparting education.

This judgment and approach of the Court is a welcome for educational institutions in India at large. An appeal has been preferred against the said judgment before a Division Bench of the Delhi High Court and now, it remains to be seen if the appellate court will find more value in the social objective involved in the case or in the rights of the copyright owners.

**Authors:** Suneeth B Katarki, Aditi Verma Thakur and Trisha Raychaudhuri

## DISCLAIMER

This alert is for information purposes only. Nothing contained herein is, purports to be, or is intended as legal advice and you should seek legal advice before you act on any information or view expressed herein.

Although we have endeavored to accurately reflect the subject matter of this alert, we make no representation or warranty, express or implied, in any manner whatsoever in connection with the contents of this alert.

No recipient of this alert should construe this alert as an attempt to solicit business in any manner whatsoever.