

by compiling them into course packs/ anthologies for sale.”

3. The Plaintiffs further allege that the acts of the Defendants are not covered by any of the copyright exceptions including fair dealing. The Plaintiffs claim that Defendant No.2 has identified relevant portions of the syllabus in the publications of the Plaintiffs, and that “*Defendant No.2 is actively encouraging its students to purchase “course packs” directly from Defendant No.1”*. The Plaintiffs claim that “*on account of actions of Defendants No.1 and 2, there would be no need for the students to purchase legitimate copies of the Plaintiffs’ publications, thereby completely destroying the market for the legitimate publications of the Plaintiffs.*”
4. The Proposed Defendant is a society under the Societies Registration Act, 1860, consisting of a group of academics drawn from several reputed academic institutions around India. Some of the members of the Proposed Defendant society also have extensive expertise in intellectual property law, having taught and/or researched it during the course of their careers. The brief biography of each of the members of the Proposed Defendant society is filed in the present proceedings. The Proposed Defendant submits that the present suit involves several key questions of law and fact that require the intervention of its members, and that these issues cannot be effectively adjudicated upon in their absence.
5. Along with several other academics and authors, members of the proposed Defendant society were appalled by *mala fide* nature of the present proceedings, and issued a letter to the Plaintiffs asking them to be mindful of the copyright exceptions in favour of educational institutions and to withdraw the law suit, on 10th March 2013. The signatories to the said letter included 33 of the suit authors (authors specifically listed out in the plaint as having authored works, which the Plaintiffs allegedly have copyright over). The letter which was signed by more than 300 renowned

academics and authors categorically stated that the academic authors were happy with their works being photocopied, for that was one of the most effective ways of furthering the educational cause in a resource strapped country like India. The Plaintiffs responded through their representative, Ms House, on 14th March 2013. Four members of the proposed Defendant society replied on 29th March 2013 to the Plaintiffs' letter stating that it was illegal to demand royalties when the copyright exceptions clearly covered the photocopying in question, particularly when the takings amounted to no more than 10% of each copyrighted work in most cases. True copies of the e-mails exchanged are filed in the present proceedings.

6. In particular, the Proposed Defendant seeks impleadment in the present proceedings in order to make submissions on the following legal issues:

- Although the prayers seek an injunctive relief against specific defendants, the plaintiffs have advocated an over-expansive interpretation of infringement and completely ignored the provisions of section 52 of the Copyright Act, which provides for a robust educational and a fair dealing exception. In effect, the suit seeks a declaration on the law as applicable not only to the present set of Defendant, but potentially applicable to all Universities and educational institutions across India, their faculty and students. This is especially so since the prayers are not confined to the parties arrayed as defendants in the suit, but seek reliefs against:

*"**all persons** ... in active concert or participation with the defendants from photocopying/reproducing Plaintiffs' publications or substantial portions thereof". (emphasis supplied)*

If the prayers in the suit are granted, there is a very real possibility that the decree in these proceedings will also bind members of the Proposed Defendant and other faculty members in other

proceedings. Given that the fact that an injunction has purportedly issued against both the Defendants, the threat of a court order that sets a precedent whittling down an important public policy exception and effectively applies to all educational institutions is a very real one.

- The Plaintiffs have evasively alleged that the acts of the Defendant University are not covered by any of the exceptions including the fair dealing exception under the Copyright Act, 1957. The Proposed Defendant seeks to refute this argument in light of the facts of the present case, by analyzing section 52 (1) (a) and section 52 (1) (i) of the Copyright Act, 1957, a reading of which would lead to the conclusion that the Plaintiffs' claim of copyright infringement, as made out in the plaint, is wholly untenable.
- The Applicants have a reasonable belief that if the present suit is decreed in favour of the Plaintiffs, they will attempt to seek the same relief against all Universities and other academic institutions. In fact, educational institutions have already been approached by the plaintiffs through the Indian Reprographic Rights Organisation (IRRO) for the procurement of yearly photocopy licenses. IRRO is a collecting society that allegedly represents the interests of book publishers.

Plaintiff No.1 has issued letters to several academic authors warning them of the fact that photocopying for the purpose of creating course packs is illegal and that they needed to procure a license for the same from the IRRO. This letter also annexes a press release from the IRRO clearly stating that academic institutions and others engaged in "*photocopying, scanning or digitally reproducing copyrighted material require a license to ensure legal compliance.*" And that "*IRRO has sent several communications together with licence application forms and tariff scheme to various*

institutions including Delhi University...". A true copy of the letter sent by Plaintiff No.1 is filed herewith.

The proposed Defendant society, which consists of academics is therefore a necessary and proper party to these proceedings.

- Members of the proposed Defendant society and other academics at the various educational institutions have a statutorily recognised exception under sections 52 (1) (a) and (1) (i) of the Copyright Act, 1957 enabling them to create copies in the course of instruction and therefore have a real and subsisting interest in the subject matter of the suit.
- The copyright exceptions in section 52 of the Copyright Act, 1957 are an explicit recognition of the importance for developing countries of the educational exception recognized by the Berne Convention as well as the Agreement on Trade Related Aspects Of Intellectual Property Rights (hereinafter, 'TRIPS Agreement). In a momentous copyright decision, the Canadian Supreme Court tellingly noted that the copyright exceptions ought to be construed more as "rights" or entitlements" accruing in favour of users such as educational institutions and not as "limited exceptions". The court noted:

"Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."

A true copy of excerpts from the decision is filed in the present proceedings.

As such, it is important that the educational exception and the fair dealing exception under Indian copyright law be interpreted as a right accruing in favour of students. Such an interpretation will go a long way towards promoting access to educational materials in a country plagued with severe issues of inequity and inequality and help translate the constitutional guarantee of the right to education for all under Articles 14 and Article 21 of the Constitution of India.

- Granting the prayers in the suit will unfairly narrow the scope of the exception under section 52 of the Copyright Act, 1957 to the serious prejudice of the right of the applicants to access knowledge, impart education and course material that is part of their syllabus. The Proposed Defendant takes strong exception to this attempt to whittle down the copyright exception and sabotage the constitutional guarantee under Article 14 and Article 21 of the Constitution of India to secure for all students the fundamental right to access education and educational resources. If the reliefs as prayed for by the Plaintiffs are granted and the compilation and distribution of course packs prevented, then students unable to afford books that are exorbitantly priced will be strongly discriminated against, when compared with students that have the financial resources to access them.
- The alleged copying has been done by a photocopier who is expressly licensed as an agent of the University to do that which the University is entitled to under the Copyright Act. The terms of the licence are clearly laid out including the fee to be charged for such course packs. A number of Indian Universities and academic institutions do not have the necessary resources to install an adequate amount of photocopiers to satisfy the requirements of all faculty, students and staff. Further, faculty and students may not have the time to engage with photocopying course packs.

Therefore, it is only reasonable to outsource this function to a third party through a specific arrangement that sets out the terms and conditions for creating course packs.

- Course packs which form the subject matter of the present suit are not wholesale reproductions of entire books and journals, but constitute a compilation of limited portions of such books and journals, designed in accordance with a prescribed syllabus so as to expose students to a wide variety of readings on a topic. The creation and distribution of such course packs by *inter alia* photocopying portions of copyrighted works and compiling them is done by the photocopier at the behest of and in accordance with the course syllabus outlined by the University.
- The copies made of extracts of the Plaintiffs copyrighted works are being made available to the students of Delhi University and not to the general public. Further, the making of such copies is governed by a clear agreement between Delhi University and the photocopier, stipulating the prices to be charged. The benefit of making material accessible to all students far outweighs any possible harm caused by the copying.
- The suit invokes an over expansive interpretation of infringement that is even broader than that existing in developed countries, even those such as the United States that do not have provisions *pari materia* with Section 52 (1) (i).
- The Plaintiffs have alleged that the sale of course packs destroys the market for the sale of the Plaintiffs publications. The Proposed Defendant seeks to refute this argument on factual and legal grounds by pointing to the following factors:
 - i. Course packs do not blindly replicate the entirety of the plaintiff's publications, but are based on a prescribed

University syllabus and are intelligently designed by faculty members to expose students to a wide variety of readings on the subject matter under study. As such, they include only extracted portions drawn from a diversity of journals and books.

- ii. It is pertinent to note that in the present law suit, all the alleged instances of copying pertain to the creation of course packs, containing only small extracts from the Plaintiffs copyrighted works. The cited instances of alleged copying involve no more than 10% of the entirety of the copyrighted work in most cases. Even in developed countries such as the United States, courts have recognized that photocopying of copyrighted material up to 10 % is “fair use” and therefore not a copyright infringement. A true copy of excerpts from the decision in *Cambridge University Press v. Becker*, 2012 U.S. Dist. Lexis 78123 (N.D. Ga. May 11, 2012) is filed herewith. It is pertinent to note that the United States contains only a “fair use” or fair dealing provision and not a separate “educational instruction” exception. By specifically elucidating an educational instruction exception, Indian law is far wider in scope than US law and ought to permit a greater range of takings from copyrighted works.
- iii. Given the excessive costs of the Plaintiffs copyrighted books and the fact that often times, the latest edition is not available for sale in India, a large majority of Indian students will be unable to afford these expensive publications. One of the members of the proposed Defendant society is a co-author of a report that empirically documents the fact that the latest editions of several legal and social science titles were only available to students in India at a price equivalent to that

prevalent in the West. A true copy of the report is filed in the present proceedings.

- iv. Course packs clearly expand the market for the copyright owner. The moment a faculty member extracts portions from a book to create a course pack for teaching and research purposes, the book becomes popular and its market expands almost immediately. In fact, the very same students who access the readings through course packs initially are likely to become purchasers of the book at a later point in time when they are gainfully employed. Prescribing the works as part of the syllabus not only confers a premium on these works but also introduces the entire student population to these works, thereby expanding the market for the plaintiffs' works among the non-student populace, whose numbers the students will join on completing their course of instruction with the University.

Based on all the above, the Proposed Defendant will seek to establish that the acts of the Defendants do not in fact interfere with the market for the Plaintiffs' publications. If at all anything, it expands the market for the works.

- It is important to note that many of the authors, whose works the plaintiffs claim copyright in, are salaried full time faculty members of reputed educational establishments. Given that the creation of text books in their relevant areas of expertise promotes valuable educational goals, it will be a travesty of justice if access to those very same text books are now impeded owing to purely private commercial considerations, at the behest of publishers. Further, many of the institutions at which the authors' are employed are public funded institutions, where their salary effectively comes out

of tax payer money, raising serious issues about access to educational works created using public funds.

- A number of leading academic authors have objected to the present law-suit by book publishers (to whom copyrights have been purportedly assigned or licensed, as per the plaint) and have supported the right of educational institutions/their students and their agents to create and disseminate educational/instructional material based on their copyrighted works. A collection of their statements expressing outrage at the present lawsuit is filed in the present proceedings.
- To allow the plaintiffs to commercially exploit the labour of salaried academics, and to reap the benefits of having their works prescribed as part of the syllabus, while simultaneously restricting the right of the University to make available copies in the course of instruction will do serious injustice to the balance in the Copyright Act between the rights of owners of copyright and the right of the Applicants and students to access educational/instructional material.
- In their plaint, the Plaintiffs have misled this Hon'ble Court in various respects, and the Proposed Defendant wishes to demonstrate that the Plaintiffs claims of copyright infringement are baseless and that their interpretation contravenes the spirit of fundamental right to education under Article 21 of the Constitution of India, particularly the right to access educational material and resources.
- The Applicants are entitled to file a declaratory suit against the Plaintiffs, but in the interests of avoiding multiplicity of proceedings, they are seeking impleadment in the present case to put forward their arguments.

7. If the prayers in the plaint are granted, it would effectively exclude the members of the Proposed Defendant society and their students/institutions from accessing valuable educational material for teaching, studying and research. Firstly, a vast majority of publications will be placed beyond the economic capacity of the average Indian student. Secondly, many educational institutions across India are resource constrained and unable to purchase multiple copies of expensive copyrighted books so as to effectively cater to a majority of their students. Further, students cannot be expected to live in close proximity to the University and access libraries frequently. The advantage of course packs containing extracts of essential readings is that students can access the materials at their convenience and for very affordable rates. This aids the educational process and access to education in a very meaningful way.

8. That the present applicants are necessary and proper parties to the present proceedings for the following, among other, reasons:
 - Because if the prayers in the suit are granted, the rights and interests of the members of the Proposed Defendant society will be seriously prejudiced. The Applicants' rights of access to knowledge and right to impart education will be severely compromised, as explained in detail in the present application. The Proposed Defendant is therefore necessary and proper parties to these proceedings.

 - Because neither Defendant No. 1, nor Defendant No. 2 can be expected to fully defend the interests of the Applicants and the wide spectrum of Indian Universities, faculty and students that are likely to be impacted by the decision in this suit. It is most respectfully submitted that the interest of the applicants in the subject matter of the suit (who are effectively representing the cause of a wide diversity of educational institutions, their

faculty and students) far exceeds that of Defendants No.1 and 2.

- If the present suit is decreed in favour of the Plaintiffs, the future of education in India will be adversely affected, as Universities and other academic institutions seeking to serve the cause of education will effectively lose the legitimate statutory protection that they are entitled to under the Copyright Act, 1957. In particular, if the suit is decreed in favour of the Plaintiffs, the cost of education will rise astronomically and the constitutional guarantee to education under Article 21 of the Constitution would be severely compromised. The members of the Proposed Defendant Society in this case are reputed academics seeking to serve the cause of education for many years now.
 - The impleadment of the Proposed Defendant is also necessary for the complete and effective adjudication of the present suit because the law in relation to the exceptions contained in sections 52 (1) (a) and 52 (1) (i) of the Copyright Act, 1957 is at a nascent stage in India. The Proposed Defendant society would be in a position to assist this Hon'ble Court by reference to precedents from other jurisdictions where the scope of these exceptions have been considered and adjudicated upon. The Proposed Defendants include reputed academics with proven expertise in copyright law.
9. The entire suit is based on a presumption of loss on the part of the Plaintiffs without even an averment as to the basis for the determination of such loss. Specifically, given the exceedingly high costs of academic text books, and the fact that these books are often not affordable or accessible to the large majority of students across India, the likelihood of such students' purchasing these text books

during their study period is extremely remote. To this extent, giving effect to Parliamentary intention and the strong public policy rationale underlying the educational exception in section 52 of the Indian Copyright Act will not destroy the Plaintiffs' market for the books in question. In fact, the very prescription of these books as part of the course syllabus of a University expands the plaintiffs' market amongst the Indian public. Even if one were to assume some loss to the Plaintiffs in the short term, such loss is clearly offset by the expansion of the market for such material caused by the University prescribing the material as its syllabus.

10. The Plaintiffs have been strongly advocating that Defendant Number 2 (Delhi University) obtain a reprography/photocopy license from the Indian Reprographic Rights Organisation (IRRO) for all photocopying, including instances where the takings amount to no more than a fraction of the full copyrighted work. The Proposed Defendant takes strong exception to this blatant misstatement of the scope of the law to various authors, academics and academic institutions in a bid to coerce them into taking licenses. Taking a licence in such cases amounts to paying for a right that does not exist and any demand for the payment of royalties in this regard is illegal and actionable under the law.
11. Given that the Defendants are entitled under law to create course packs and aid the educational process without paying any fee whatsoever, the forceful execution of an IRRO license would contravene an important public policy provision crafted by our law makers to effectively translate an important constitutional mandate of the State to secure access to education and educational material for all. There have been earlier instances where the Plaintiffs/IRRO and their counterparts have offered low licensing fees to Universities abroad and then proceeded to rapidly escalate the rates. This has caused some of the Universities abroad to now re-examine and even terminate their licenses with publishers/their

agents and collecting societies such as IRRO. True copies of a news report pertaining to this issue are filed in the present proceedings.

12. The right of faculty members, academics and students to access educational material cannot be left to the vagaries of private contract or settlement between commercial publishers and universities - either in the form of reprography licence or other commercial arrangements - especially in the light of the explicit legislative protection contained in Sections 52 (1) (i) (i) and 52 (1) (a) of the Copyright Act. Through the present proceedings, the Plaintiffs attempts to subvert the mandate of the law and read the monopoly conferred over-broadly and the specific exceptions too narrowly.

13. The matter before this Hon'ble Court is of great importance to the future of education in India and the interests of academic institutions and students, given that the core issue concerns the preparation and use of course packs, an integral and vital part of teaching at almost every educational establishment. By advocating an over expansive notion of infringement and completely whittling down an important educational and fair dealing defence, the present suit, if decreed in the manner prayed for will effectively negate a valuable fundamental right enshrined in the constitution, namely the right to education, under Article 21 of the Constitution of India.

PRAYER

14. In light of the facts and circumstances set out hereinabove, the Proposed Defendant humbly prays that this Hon'ble Court may be pleased to allow the present application allowing the Proposed Defendant society to be impleaded as a Defendant in the present suit, and this Hon'ble Court may be pleased to pass any order as it deems fit in the facts and circumstances of the present case.

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Through

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