

Begin forwarded message:

From: Shamnad <shamnad@gmail.com>

Subject: Re: Academic Course Packs and the Copyright Educational Exception

Date: 29 March 2013 2:45:03 PM GMT+05:30

To: EHouse@publishers.org.uk, pphillips@cambridge.org, roger.horton@tandf.co.uk, nigel.portwood@oup.com, ranjan.kaul@oup.com, phillips@highburypl ace.com, msaikia@cambridge.org, shammi.manik@tandfindia.com

Cc: Nivedita Menon <niveditamemon2001@yahoo.co.uk>, nandini sundar <nandinisundar@yahoo.com>, Amita Baviskar <amita.baviskar@gmail.com>

To:

Ms Emma House

Director of Publisher Relations

The Publishers Association Limited

Dear Ms House:

Thank you for your email dated 14 March 2013 in response to our email dated 10 March 2013.

Our response is as below:

1. Firstly, the creation and distribution of course packs is not in contravention of Indian copyright law as your letter implies. May we please refer you to the following provisions:

i) Section 52(1)(a) of the Indian copyright act exempts from infringement any “fair dealing” with a copyrighted work for the purpose of research.

ii) Section 52 (1) (i) is a separate exception from the one above and exempts from infringement any use of a copyrighted work for the purpose of educational instruction.

Contrary to the suggestion in your letter, the educational use exception under section 52(1) (i) is not qualified by any “fair dealing” or “fair use” restriction. In other words, any dealing with a copyrighted work for the purpose of educational instruction is exempted from the scope of copyright infringement.

2. Even in countries such as the United States that contain only a “fair use” provision and not a separate “educational instruction” exception, courts have held that a 10% taking in most cases constitutes fair use. We believe that by specifically elucidating an educational instruction exception, Indian law is far wider in scope than US law and permits a greater range of takings from copyrighted works. In any case, the vast majority of the takings complained of in the law-suit filed by you amount to no more than 10% of the copyrighted works in question.

3. As you can appreciate, the photocopier in this case is not a stand-alone commercial photocopier, but an agent of the University acting under a specific licence from it, which sets out various terms including the fee to be charged for the creation and dissemination of course packs. All these documents are on record in the case filed by you and you no doubt have access to them. You will appreciate that a vast majority of Indian universities and educational institutions are resource strapped and may not have an adequate number of photocopy machines to cater to all students and faculty. Even otherwise, faculty and students may not have the time to do the actual

photocopying themselves. Therefore, academic institutions ought to have the liberty to contract with agents to do this for and on their behalf.

4. You argue that you strive to make all works accessible to Indian students. We have documented several instances where the prices of your books are equivalent to those sold in the higher income Western markets and are highly unaffordable and inaccessible to an average Indian student. The intervention filed by the student association in your law-suit also bears testimony to this unfortunate reality.

5. We see no reason to take a license from IRRO when the creation and distribution of course packs is well within the ambit of the educational instruction exception outlined earlier. Taking a licence amounts to paying for a right that does not exist. It bears reiteration that photocopying for the purpose of educational instruction is a legal exception under copyright law and one is exempted from seeking the permission of the copyright owner and/or paying any licence fees for such activities.

We note with great concern the repeated assertion by both you and the IRRO, in letters circulated to various Indian universities, of a right that you are not entitled to. We were forwarded a copy of the letter issued by OUP India's office to various authors (except the four of us) suggesting that the creation of course packs are illegal. This letter annexes an IRRO letter which states in pertinent part that academic institutions and others engaged in "photocopying, scanning or digitally reproducing copyrighted material require a license to ensure legal compliance."

We would caution you that any claim for the payment of royalties in respect of a photocopying activity that is clearly covered by an express exception in Indian copyright law is illegal and actionable under the law. We would therefore urge you to desist from blatantly misstating the scope of the law to various authors, academics and academic institutions in your bid to coerce them into taking licenses.

6. As you can appreciate, our Parliament thought it fit to exempt core aspects of teaching and research from the private sphere of copyright infringement in order to aid a valuable public policy goal and to effectuate the Constitutional promise of a fundamental right to education and educational resources for all. As such, we would caution you and the IRRO from thwarting this important policy goal through an illegal claim to licensing royalties.

We also refer you to an important Supreme Court ruling in Canada (*CCH Canadian Ltd. v. Law Society of Upper Canada* (2004 SCC 13). where the court held that copyright exceptions are not to be restrictively interpreted, but are in the nature of valuable user rights that accrue in favour of beneficiaries such as educational institutions. In the courts' words:

"...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."

7. Even otherwise, the licensing option that you advocate is a dangerous path to tread, given that royalty rates are subject to your discretion and could escalate in the coming years. We are guided by the Canadian experience, where a rapid rise in royalty rates forced Canadian universities to terminate their licensing arrangements with you.

8. Lastly, the IRRO does not hold rights to all published works and the illegal licensing policy that you seek to advance would greatly add to the administrative costs of universities in seeking

licences from a wide variety of copyright owners. It would also considerably delay access to works and hamper important an educational goal enshrined in our Constitution.

Yours sincerely,

Prof Nivedita Menon, Jawaharlal Nehru University (JNU), New Delhi
Prof Amita Baviskar, Institute of Economic Growth (IEG), New Delhi
Prof Nandini Sundar, Delhi University (DU), New Delhi
Prof Shamnad Basheer, National University of Juridical Sciences (NUJS), Kolkata

On 14-Mar-2013, at 3:48 PM, nivedita menon wrote:

----- Forwarded Message -----

From: Emma House <EHouse@publishers.org.uk>

To: niveditamenon2001@yahoo.co.uk

Sent: Thursday, 14 March 2013, 13:30

Subject: FW: Response to email

Dear Ms Menon

Please accept my apologies for referring to you as Mr Menon.

KInd regards

Emma

From: Emma House

Sent: 14 March 2013 07:43

To: niveditamenon2001@yahoo.co.uk

Cc: pPhillips@cambridge.org; Mr. Roger Horton (roger.horton@tandf.co.uk)
(roger.horton@tandf.co.uk); nigel.portwood@oup.com

Subject: Response to email

Dear Mr Menon

I respond on behalf the publishers to your email requesting publishers to withdraw their copyright law suit.

As publishers we strive to disseminate our materials as widely as possible; balancing the need to ensure our titles are accessible to the audiences they serve whilst compensating fairly those that develop and produce high quality content.

We believe that coursepacks play an ever-more important role in this process; providing relevant segments of copyrighted works for students at affordable prices. However, it is vital that those creating coursepacks act within the legal framework which supports the production of high quality educational content. Through this court case we have sought to challenge the illegal duplication of copyrighted materials for sale by a commercial photocopying shop, not the validity of the “fair dealing “ exceptions to the Copyright Act.

For those looking to create coursepacks, the Indian Reprographic Rights Organization (IRRO) offers a legitimate and accessible method for securing permissions, and offers copyright tariffs which are amongst the lowest in the world—as little as 50 paise per page. It is possible for educational institutions to produce coursepacks which are accessible and affordable; ensuring seamless access to copyrighted works for our students to further their studies.

With regards,

Emma House
Director of Publisher Relations
The Publishers Association Limited

Begin forwarded message:

From: nivedita menon <niveditamemon2001@yahoo.co.uk>
Subject: Academics ask you to withdraw copyright law-suit
Date: 10 March 2013 12:03:49 PM GMT+05:30
To: "nigel.portwood@oup.com" <nigel.portwood@oup.com>,
"ranjan.kaul@oup.com" <ranjan.kaul@oup.com>,
"phillips@highburyplace.com" <phillips@highburyplace.com>,
"msaikia@cambridge.org" <msaikia@cambridge.org>,
"roger.horton@informa.com" <roger.horton@informa.com>,
"shammi.manik@tandfindia.com" <shammi.manik@tandfindia.com>
Cc: "WebEnquiry.UK@oup.com" <WebEnquiry.UK@oup.com>,
"admin.in@oup.com" <admin.in@oup.com>, "kolkata.in@oup.com" <kolkata.in@oup.com>,
"cupdel@cambridge.org" <cupdel@cambridge.org>,
"journalsales@tandfindia.com" <journalsales@tandfindia.com>,
"authorqueries@tandf.co.uk" <authorqueries@tandf.co.uk>, amita baviskar <amita.baviskar@gmail.com>,
nandini sundar <nandinisundar@yahoo.com>,
Shamnad basheer <shamnad@gmail.com>
Reply-To: nivedita menon <niveditamemon2001@yahoo.co.uk>

March 9, 2013

Dear OUP, CUP and Taylor & Francis,

We refer to a law-suit filed by you against Delhi University (DU) and its photocopier, Rameshwari Photocopying alleging copyright infringement in the creation and distribution of “course packs”.

We are forwarding to you a letter signed by 309 academics and authors from around the world, among whom are 33 authors specifically mentioned by you in the said law suit, as being authors of books over which you allegedly own copyright (hereafter referred to “suit” authors).

This letter asks you to withdraw the law suit filed in the Delhi High Court claiming copyright infringement by Rameshwari Photocopy Services and Delhi University and seeking damages and a restraining order

We are of the firm belief that these academic “course packs” which are the subject matter of your law suit fall within the ambit of statutory exceptions to copyright infringement and in particular are covered under Sec. 52 (1) (a) and 52 (1) (n) of the Copyright Act in India.

Since the law suit filed by you claims that you are acting on behalf of authors and representing the interest of authors, we hope you will take seriously this strong statement by authors and academics that you do not speak in their name.

The “suit” authors who have signed the letter include leading academics such as Professors Thomas Blom Hansen, Partha Chatterjee, Ayesha Jalal, Christophe Jaffrelot, Veena Das, Pratap Bhanu Mehta and Marc Galanter.

Among the other eminent academics/authors who have signed this letter are Professors Richard Falk, Arjun Appadurai, Jonathan Parry, Ramachandra Guha, Farid Esack, TN Madan, Ian Copland, Tanika Sarkar and Uma Chakravarty. As you can see, the list of signatories include academics from all over India and from universities in Europe, the USA, UK, South Africa, Singapore, Australia, Argentina and Palestine.

Please find attached the following:

1. Letter to the three of you (OUP, CUP and Taylor & Francis) signed by 309 academics and authors from around the world, the first 33 of whom are “suit” authors.
2. Letter sent separately by Prof Amartya Sen in September to OUP expressing his distress at the law suit.
3. Email sent by Raju Ramachandran, a leading senior counsel and “suit author” who has opined that the creation and distribution of course packs for educational purposes is clearly covered by the copyright fair use and educational exception.
4. Email sent by Kaushik Sundar Rajan, a leading academic and author supporting the photocopying of his books to further the educational cause.
5. A comprehensive list of signatories to a protest petition on [change.org](https://www.change.org). This consists of 1267 names, including academics, authors, students, and members of the general public who are worried about your law suit and its implications for the future of access to education in India. This list of names can also be found at:

<https://www.change.org/en-IN/petitions/academics-appeal-to-publishers-to-withdraw-suit-filed-against-delhi-university>

Signed:

Amita Baviskar, Institute of Economic Growth
Shamnad Basheer, National University of Juridical Sciences
Nivedita Menon, Jawaharlal Nehru University
Nandini Sundar, Delhi University