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In the High Court of Delhi at New Delhi
Civil Suit Number 2439/2012

In the Matter of:

The Chancellor, Master And Scholars Of The University
Of Oxford And Ors Plaintiffs

Versus
Rameshwari Photocopy Services and Anr. Defendants

Preliminary Brief Synopsis of Submissions
on behalf of Defendant No. 3

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I. What the plaintiffs seek injunction in respect of is expressly protected by section 52 (1) (i) since it is 'by teacher or pupil' and it is in the 'course of instruction'

A. It is 'by teacher or pupil' because even as per the plaintiffs' case defendant number 1 is acting at the behest of teachers of defendant number 2, for its students

The plaintiff states at paragraph 9 that "it is submitted that the course packs reproduced and issued by the defendant no. 1 are based on the syllabi issued by the University of Delhi for its students. The plaintiffs' publications and the exact page numbers reproduced in these course packs are suggested by the defendant no. 2 through the syllabi published in its website"

At paragraph 10 - ".....Defendant no. 1 was allocated space inside the Delhi School of Economics campus through an open tender, and that a committee consisting of the three heads of the Departments, the Deputy Librarian (Ratan Tata Library), and the President the DSE Student's Union took the decision....

.....it was decided that the defendant no. 1 would photocopy 3000 pages free of cost for the Ratan Tata Library of the defendant no. 2 in view of the licence fee."

At paragraph 11 ".....the faculty teaching at the University of Delhi is recommending 'course packs' for reproduction by the defendant no. 1. Further, the Ratan Tata library, which is operated by the defendant no. 2, is issuing books to the defendant no. 1 for such reproduction. The defendant no. 1 in return, is providing free copies of the plaintiffs' publications to the defendant no. 2 as licence fee in view of the aforementioned arrangement and the allocation of space inside the Delhi School of economics..... Therefore, the act of allocating space and allowing such reproduction spells direct monetary gain for defendant number 2, the defendant no. 2 stands to illegally profit from such unauthorised reproduction of the plaintiffs' publications"

At paragraph 15 "it is respectfully submitted that the defendant no. 2 has identified relevant portions of the syllabus in the publications of the plaintiffs, and given on rent its premises for the business of photocopying, which the defendant no. 1 is engaged in."

B. It is 'by teacher or pupil' also because Defendant number 1 acts as agent of defendant number 2

The relationship between Defendant No.1 and 2 is determined by the terms of a licence granted by the Delhi School of Economics to defendant No. 1. The licence terms explicitly provide that the licensee will provide photocopying services only to bona fide students, teachers, staff of the Delhi School of economics and authorised users of the Ratan Tata library and will not undertake any outside job. It also stipulates the fee that defendant number 1 is allowed to charge for photocopying and the working hours when the photocopying facility will be allowed to operate. It provides that defendant number 2 will have right of free access to the room where the photocopying facility is located. Defendant No.2 fulfills its obligations to its students by employing defendant no.1 to facilitate access to educational materials, to do what its teachers or students could have done.

C. It is in the course of instruction because

- 1. 'Instruction' has not been defined in the copyright act but dictionaries have defined instruction to mean "the imparting of knowledge or skill; education"

a) P. Ramanatha Aiyar's, 'The Law Lexicon'

The term instruction has not been defined in the Copyright act. P. Ramanatha Aiyar's, 'The Law Lexicon', 3rd Edition 2012, defines instruction in the context in which the term is used in the Copyright act as -

"'Instruction', within the meaning of the rule that the necessities which a husband is bound to provide for his wife includes instruction, etc., means some degree of education as taught in the schools."

Something that is imparted in order to instruct. [Explan. 1 of S.29, IPC (45 of 1860)]; the action of instructing or teaching; the imparting of knowledge or skill; education [S.2 (h), Prov. (iii), Trade Unions Act (16 of 1926)]"

b) The Oxford English Reference Dictionary

Second Edition, Revised, edited by Judy Pearson and Bill Trumble, Oxford University Press defines instruct and instruction as:

instruct (often foll. by *in*) *v.tr.* 1 teach (a person) a subject et cetera (instructed her in French). 2 (usu. followed by *to* + infin.) direct; command (*instructed him to fill in the hole*). 3 (often foll. by *of* or *that* etc. + clause) inform (a person) of a fact etc. 4 *Brit* a (of a client or solicitor) give information to (a solicitor or Counsel). *b.* authorize (a solicitor or council) to act for one. [ME *f. L instruere* instruct- build, teach (as IN-2 *struere* pile up)]

instruction *n.* 1 (often in *pl.*) a direction; an order (*read the instructions; gave him instructions*). 2 teaching; education (*took a course of instruction*). 3 (in *pl.*) Law directions to a solicitor or counsel. 4 *Computing* a direction in a computer program defining and effecting an operation. *Instructional adj.* [ME *f. OF LL* *Instruction -onis* (as INSTRUCT)]

2. Instruction is a wider term than classroom lecture

Instruction encompasses all those activities that are necessary to the imparting of knowledge or skill and will include the classroom lecture but will not be limited to it. It will also include design and prescription of syllabus, scheduling and order of readings, directions regarding compulsory readings and optional or recommended readings, seminars and tutorials which involve student presentations and discussion, papers and essays - whether the papers and essays are marked or not - field trips and observations etc.

3. If parliament intended to limit 52 (1) (i) only to reproduction by teacher or pupil that begins with the classroom lecture and ends with it as claimed by the plaintiffs, it would have used the term 'by teacher or pupil in the course of a 'lecture', section 2 (n) of the Copyright act

Lecture has been separately defined in section 2 (n) of the Copyright act in the following terms - "lecture includes address, speech and sermon". If Parliament had intended to restrict the term "in the course of instruction" in the manner contended by the plaintiffs, Parliament would have more appropriately used the terms

- "in the course of delivering or receiving a lecture" or
- "at the time of classroom lecture" or
- "during a lecture" or
- "while making an address to students" or
- "while making a speech to students" or
- while making a sermon to students" or
- "copies for classroom use" (*pari materia*, US Code, Title 17, Chapter 1, § 107)

4. The term 'instruction' used elsewhere in the Copyright Act suggests that it was not meant to be limited to a classroom situation, and in fact is not even limited to the activities of educational institutions or activities of a non-commercial nature.

a) Section 32 (5)

Section 32 (5) provides that a Broadcasting Authority may apply to the Copyright board for a licence to produce and publish translations of texts incorporated in audiovisual fixations so long as such fixations are prepared or published solely for the purpose of systematic instructional activities, if such broadcasting of translation is for the purpose of teaching or for the dissemination of the results of specialised, technical or scientific research to the experts in any particular field. To interpret instruction in the manner that the plaintiffs seek to do would limit this provision only to audiovisual fixations prepared or published solely for the purpose of classroom teaching. This could not have been the intent of Parliament.

b) Section 32 (1A)

Further section 32 (1A) provides that application can be made to the Copyright board for license to produce and publish translations within a period of three years from the first publication of the work, if the translation is required for the purposes of teaching, scholarship or research, and subclause

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(6). Explanation (d) provides that "purposes of teaching research or scholarship" includes "purposes of instructional activity at all levels in educational institutions". Once again, instructional activity in the subclause cannot be read to refer only to the classroom lecture or teaching imparted by teacher to pupil in the classroom.

c) *Section 52 (1) (h)*

And most importantly, 'instructional' finds mention also in section 52 (1) (h) and allows for publication of copyright material as part of anthologies and chrytomathies if they are meant for instructional use. In this context as well, the term instruction clearly cannot be limited to a lecture, or to speech, lecture or teaching in a classroom situation.

5. **Plaintiffs' interpretation that "course of instruction" begins and ends with the classroom lecture would mean that the teacher cannot prepare slides/ Power point presentations containing Copyright material – such as poems etc. before the class begins**

To interpret "in the course of instruction" as being limited in time and space to the classroom lecture – and to exclude all acts before the classroom lecture or after the classroom lecture – would mean that it would no longer be open for a teacher to even transcribe poems, drawings or other copyrighted works on the blackboard or to include copyright material in slides et cetera, except if the slides were prepared or the blackboard was transcribed during the classroom lecture.

Interpretation advanced by the plaintiffs will lead to rank absurdity. The New Zealand Court of Appeal for Auckland, in the matter of *Longman group Ltd versus Carrington Technical Institute Board Of Governors* held that "in its ordinary meaning, the course of instruction would include anything in the process of instruction with the process commencing at a time earlier than the time of instruction, at least for a teacher, and ending at a time later, at least for a student. So long as the copying forms part of and arises out of the course of instruction it would normally be in the course of instruction."

6. **At the higher education level, and especially at the Delhi School of Economics, instruction begins with the commencement of the course and does not end until the course is concluded**

At the higher education level instruction begins with the commencement of the course and does not end until the course is concluded. Instruction includes lecture but is not limited to it.

a) ***Because instruction is not based on the lecture model but is interactive – seminars, tutorials and discussions are central***

The defendants submit that prescribed readings are meant to give pupils a grasp of the area, and they are expected to have read them before attending the classroom lecture, which then becomes the space for involved discussion about the texts in question.

A very important component of instruction at the higher education level is discussion and debate that happens between

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teacher and student and among the students in the space provided through tutorials, seminars and presentations.

Some teachers may still prefer the lecture model of instruction, but even such teachers provide for space for questioning and discussion, even during the lecture itself. But a substantial component of most of the courses taught at DSE is through the seminar, discussion and tutorial process

That instruction happens in an interactive process and not in the manner of lecture after lecture, which remains the same year after year is also relevant in considering the manner in which reading materials are handed out.

b) Syllabus is Dynamic – Not Fixed and Unchanging –

The plaintiff assumes that texts that are being copied by defendant no.2 have been written expressly for their use in teaching in the classroom context and that they are part of a fixed and unchanging syllabus, and that once these texts become part of a syllabus, they are then freely copied, semester after semester and year after year. This argument is innocent of the nature of university education, especially of education imparted at the post graduate level in Delhi University (DU). In fact, although the syllabus prescribed by DU includes a list of necessary readings, the faculty teaching the course has a great degree of flexibility in deciding the articles that must be read. This is especially because the MA is taught only at the University level and not in individual colleges. As a result, the person teaching the course is also the person setting the examination and who will evaluate the students and can therefore tailor the readings according to the requirements of the program.

In fact, there are at least three separately identifiable steps which determine the readings which will be prescribed and therefore possibly photocopied.

- When the syllabus is set by the University
- when readings are prescribed by the course instructor before the course begins
- when the readings are changed – new readings added and old readings dropped – in the course of instruction itself, in order to suit the specific needs of the students being taught.

At the second level, the course instructor has a substantial degree of independence in deciding what are the readings that are essential for a particular course keeping the course objective in mind. To illustrate, consider paper 201 'Comparative Political Analysis'. The Delhi University had prescribed a syllabus with 43 readings for this paper. In 2011, the course instructor in the Department of Political Science, DU included only 5 of these university prescribed readings in his own list of readings (Adil Khan, *Politics of Identity, Ethnic Nationalism and the State in Pakistan*; Keith Faulks, *Political Sociology*; Rod Hague and Martin Harrop, *Comparative Government and Politics*; Sarah Joseph, *Political Theory and Power*, Alavi Hamza, *State and Class Under Peripheral Capitalism*). The same paper was taught once again in 2013, by the same course instructor. The articles put together for the modules on

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'Comparative Methods and Approaches' and 'Development' for 2013 is entirely different from those in 2011; all the readings are different from the readings prescribed by the course instructor for 2011.

Changes in the readings suggested are also often effected when there is a change in the course instructor. To achieve the same course objective, different instructors may choose different readings and different approaches. Reading materials which the students are advised to photocopy will therefore change drastically depending upon the course instructor.

The plaintiff's apprehension therefore that the texts published by them which have achieved a certain recognition, fame or notoriety are repeatedly copied, year after year, therefore resulting in loss of revenues from those specific texts is misplaced. The texts that are suggested and that are copied change from year to year, and most importantly, course instructor to course instructor.

7. If Parliament intended to exclude photocopying from the scope of 52 (1) (i) it would have expressly excluded "reprography" from 52 (1) (i) (i)

"Reprography" has been defined in section 2. (x) as the making of copies of a work by photocopying or similar means, if Parliament's intention was to exclude all copying made before or after the class, "by the use of a duplicating process" as provided for in the UK Copyright Act, reprography would have been expressly excluded from the scope of the application of section 52 (1) (1) (i) (i).

8. Restrictions - including fair use/dealing - cannot be read into section 52 (1) (i)

A plain reading of the statute clearly reveals that 'fair dealing' only qualifies section 52 (1) (a) of the Statute and does not qualify section 52 (1)(i)(i).

9. Words must be give their plain meaning

It is well settled that "the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. All that we have to see at the very outset is what does the provision say? ...the language employed is the determinative factor of the legislative intent." Lalita Kumari v. Govt. of U.P., (2014) 2 SCC 1

Further, even if a plain reading of the text 'seems' "unfair", the principle of interpretation that should guide the court is this: when there are two possible ways of interpreting a provision, the court must pick the literal interpretation even if it seems unfair unless this leads to rank absurdity (Nasiruddin v. S.T.S Tribunal). Although it may be the case of the plaintiffs that section 52(1)(i)(i) as it reads today does not impose any restrictions on educational use and is hence unfair to publishers, it is nobody's case that the result of this is absurd. Parliament's clearly articulated carving out of the 'educational exception' cannot be circumscribed by reading of the Copyright Act only because so doing furthers publishers' business interests. This is especially so given that the copyright act, by instituting a statutory monopoly, artificially creates a market where none would have existed. While so creating the market, the act also defines the scope of the market and excludes use by teacher and pupil from its ambit.

10. If Fair Use did not qualify the educational exception in the US, photocopying of the kind sought to be enjoined in this suit would have been protected in the US as well

Title 17, Chapter 1, section 107, *pari materia* provision of US copyright law specifically limits reproduction to the making of multiple copies for classroom use – and further qualifies such reproduction by requiring that it be 'fair use'. There are four factors used to determine whether reproduction is fair use or - 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, 2) the nature of the copyrighted work, 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and 4) the effect of the use upon the potential market for or value of the copyrighted work. The teaching limitation has been considered only by one appellate court in the matter of Princeton University Press V. Michigan Doc., 99 F.3d 1381 (6th Cir. 1996). The minority opinion expressly found, even given the requirement that the teaching limitation be 'fair use' that photocopying even by commercial enterprises, so long as it was at the instance of teacher or student was protected. The majority opinion however concluded that, in the facts, that photo copying by a commercial, for-profit enterprise, did not meet the educational exception since it was not 'fair use'. Most importantly however, even the majority opinion felt compelled to hold that such photocopying was not protected only because the provision on educational use in the United States is qualified by the term "fair use". (Footnote 1 of the majority opinion.)

"Judge Merritt's dissent rejects this proposition and asserts, in effect, that under the plain language of the copyright statute the making of multiple copies for classroom use constitutes fair use ipso facto. Judge Merritt's reading of the statute would be unassailable if Congress had said that "the use of a copyrighted work for purposes such as teaching (including multiple copies for classroom use) is not an infringement of copyright." But that is not what Congress said. It said, rather, that "the fair use of a copyrighted work, including such use [i.e. including "fair use"] . . . for purposes such as . . . teaching (including multiple copies for classroom use) . . . is not an infringement of copyright."

Therefore, if the law in the US was as it is in India – i.e., copying by teacher or pupil is not qualified by "fair use" or "fair dealing", the majority would have found the opinion of the minority unassailable.

11. **Distinction between 52 (1) (h) and 52 (1) (i) (i)**

The plaintiffs contend that limiting the application of section 52 (1) (i) (i) to slides or classroom handouts that are actually copied while the class is in progress is also required in order to give full effect to the section 52 (1) (h). The plaintiffs also contend that the making of course packs is more appropriately understood as "publication in a collection" than reproduction in the course of instruction. The plaintiffs point to the fact that section 52 (1) (h) refers to publication whereas 52(1)(i)(i) refers to reproduction and that the making of copies by the Defendant No.1 did not constitute reproduction but constituted publication.

a) **'Reproduction' is not used to mean 'use by an individual' in contradistinction to 'use by more than one person'**

The plaintiff's case in this regard may have been tenable if the Copyright Act used the term "reproduction" as a term that means

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'use by an individual' in contradistinction to 'use by more than one person'. This however is not the case.

(1) Section 52 (d)

This is evident from section 52 (d) that provides that reproduction of any work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding will not amount to copyright infringement. Reproduction, in this clause, is not limited to copies made for individual or personal use but also includes copies that may be available as part of a report of a judicial proceeding, which necessarily means a report which will be available and accessible to the more general public.

(2) Section 52 (f)

Also provides that reproduction of any work in a certified copy will not amount to copyright infringement. Reproduction, once again, is not limited to the use of an individual or for personal use but includes making it available to the public.

(3) section 52 (m)

However, the most significant argument for the proposition that reproduction is not a term that necessarily excludes making copies available to any public is provided by section 52 (m) which provides that reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics will not amount to infringement of the copyright, unless the authors have expressly reserved to themselves the right to such reproduction. Newspapers and other periodicals are clearly made available to the larger public and reproduction in newspapers cannot be said to be only for individual or personal use. If the Copyright Act was using the term reproduction in contradistinction to publication, the term used in section 52 (m) would have been publication and not reproduction.

In the circumstances, the fact that the term used in section 52 (1) (i) (i) is reproduction and not publication cannot limit the application of the provision only to copies made by individual students or teachers. This is particularly so in the light of the fact that, even as per the case of the plaintiffs, Defendant No. 1 stands clearly as an agent of Defendant No. 2.

b) Recent amendments replaced "educational institutions" with "for instructional use"

The provision in the UK Copyright Act which corresponds to the current section 52(1)(h) of the Indian Copyright Act, 1957 is applicable to "educational institutions" alone. Significantly, the Indian parliament in the most recent amendments replaced "educational institutions" with "for instructional use". This has significantly clarified the difference in the scope and applicability of sections 52(1)(h) and 52(1)(i)(i).

c) Section 52 (1) (h) is broader in its coverage of the persons:

The plaintiffs have entirely missed the crucial difference between the scope of application of clause (h) and clause (i)(i) of section 52. Section 52 (1) (h) is broader in its coverage of the persons or practices that it will be available to – i.e. it is available for all instructional use – whether that use is by a teacher or pupil, whether it is by an author, whether it is by a commercial or non-commercial entity, whereas section 52 (1) (i) (i) is available only to a very limited class – i.e. teacher or pupil.

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d) Rights conferred under section 52 (1)(h) are wider

While the category of persons to which the rights conferred under section 52 (1)(h) is wider than the category of persons to whom the rights provided under section 52(1)(i)(i) will be available, the kind of copying/reproduction that will be allowed under section 52 (1)(i)(i) is much more extensive and encompasses all reproduction of any kind. On the other hand, reproduction or publication for the purposes of section 52(1)(h) is of a very limited kind and its terms are explicitly set out in the sub-clause itself. This reflects parliament's narrow tailoring of the scope of user rights to cover only those necessary and essential to a developing country.

Copying permitted by section 52 (1) (h) covers for example - the reproduction or publication of passages from literary works in order to instruct in the learning of a language or in the teaching of particular styles of writing - for example, setting out short passages in a book to instruct readers on the English-language, setting out passages from literary works in order to demonstrate grammatical errors, form or style. Similarly, reproduction or publication of short passages of musical work - whether printed or otherwise - in order to instruct in the playing of a tune or musical instrument.

II. The suit merits rejection in limine since the owners of copyright have not been made defendants in accordance with section 61 of the Copyright Act

Section 17 of the Copyright Act provides that the author of a work will be the first owner of copyright, section 18 (Chapter IV more generally) provides for assignment of copyright and section 30 (Chapter VI more generally) provides for licensing of copyright. In the present suit, although the plaintiffs claim to be owners of copyright in respect of some books which are part of the Annexure to the plaint, the plaint contains no pleadings as to whether the plaintiffs are the assignees, licensees or exclusive licensees or as to the right, title or interest of the plaintiffs or how they came to acquire such right, title or interest. Plaintiffs have however filed copies of purported assignment deeds of 16 authors.

Section 61 of the Copyright Act provides that in every civil suit regarding infringement of copyright instituted by an exclusive licensee, the owner of copyright shall, unless the court otherwise directs, be made a defendant and where such owner is made a defendant, he shall have the right to dispute the claim of the exclusive licensee. In the present suit, at the highest, the plaintiffs can claim to be owners of copyright in respect of the 16 assignment deeds alone, by virtue of section 18 (2) of the Copyright Act. The plaintiff's suit in respect of all other publications is not maintainable.

This is not merely an objection of form, since many of the authors of works published by the plaintiffs have clearly stated their objection to the suit filed by the plaintiffs. In the circumstances, the plaintiff's failure to make the owners of copyright parties to the suit is fatal to the suit in so far as publications for which the plaintiffs have not filed assignment deeds. Had the plaintiffs made the owners of copyright party, they would also have a right to be heard in these proceedings.

III. Acquiescence disentitles the Plaintiff's to the reliefs claimed

The kind of photocopying sought to be enjoined in the suit has been practiced for long years and the plaintiffs have never before sought to prevent

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it. At arguments, Counsel for the plaintiffs stated that the present suit was a 'test case'.

All parties, including the plaintiffs, authors who have assigned copyright to the plaintiffs, universities and colleges have always understood section 52 (1) (i) as excluding copying made in the course of instruction in the broadest sense and not as being limited in time and space to classroom lecture as suggested by the plaintiffs. Many of the authors of books published by the plaintiffs are academics drawing a salary from universities. Having secured assignment from authors in the context where such copying was permitted and having lead universities and colleges to prescribe such works as part of the syllabus, the plaintiffs have acquiesced the use of their works that they seek to injunct today. This is particularly because the profits had by plaintiffs by the fact that works in which they have secured copyright are prescribed for study by the teachers of Defendant No.2 is incalculable. 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 future academics, researchers, higher-education entrants, as well as professionals in diverse fields such as law, advocacy, politics, journalism, independent research etc. The Copyright act while instituting a limited monopoly and facilitating commercial exploitation, explicitly excludes copying in the course of instruction from the scope of that monopoly. 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 society to have greater and more equitable dissemination of knowledge and learning.

IV. Prayers seek omnibus reliefs that are overbroad, vague and indeterminate

That the suit as laid is not maintainable and merits rejection *in limine* since the omnibus reliefs it seeks are overbroad, vague and unspecific. Prayer a) of the plaint seeks an injunction in respect of all books of all four plaintiffs, including but not limited to the books enumerated in Annexure I of the plaint. It is most respectfully submitted that injunctive relief cannot be granted in respect of unspecified properties that are not enumerated either in the plaint or annexure. The suit therefore merits rejection *in limine* since the prayers are vague and not supported by averments in the plaint.

No omnibus injunction of the nature sought by the plaintiffs -- "including but not limited to the books included in Annexure I"-- can be granted. Ownership and violation of copyright of each work has to be examined independently along with the rights granted under section 52. Trial in these proceedings will examine the plaintiffs' claims to ownership and violation, and as to whether the acts of the defendants are not excluded from copyright protection by section 52 on a case-by-case basis. For this the plaint must enumerate the works in which copyright is claimed and establish ownership and violation of copyright contrary to law in respect of each of their works. Time Warner Entertainment vs RPG Netcom And Ors, 140 (2007) DLT 758, AIR 2007 Delhi 226, Indian Performing Rights Society vs Badal Dhar Chowdhury, 2010 (6) RAJ 558 Del @ page 561, paras 5 and 7

V. Prayers have no relation to the Cause of Action

That the suit as laid is also not maintainable and merits rejection *in limine* since its prayers are overbroad and bear no relation to the cause of action averred in the plaint. The plaint is founded in the allegation that the copyright of the plaintiffs was violated when the defendant no.1 sold works that the plaintiffs claim rights in to the person authorized to purchase the works on

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behalf of the plaintiffs, who was not a student of defendant no.2. The remedy of the plaintiffs, if any, it is most respectfully submitted, is for the plaintiffs to seek damages for injury sustained from the act of the defendants selling copyrighted work to a person who is not a student. The cause of action as averred in the plaint does not support injunctive relief, or damages, or rendition of account of the sort claimed by the plaintiffs.

VI. Relief sought vide prayer a) is legislative

That the suit as laid is also not maintainable and merits rejection *in limine* since the reliefs sought vide prayer a) are legislative in nature. By seeking a permanent injunction

- "restraining the defendants and all persons ... in active concert or participation with the defendants from photocopying/reproducing and issuing illegal/un-authorized copies of the plaintiffs publications or substantial portions thereof, including but not limited to books included in Annexure 1, in any manner whatsoever, without the requisite consent of the plaintiff number 1, the plaintiff number 2 and the plaintiff number 4 and/or from doing any other act amounting to infringement of the plaintiffs copyright" -

in effect, the plaintiffs seek to nullify all of section 52 of the Copyright act, 1957 in so far as their publications are concerned. The scheme of the Copyright act, 1957, explicitly excludes acts enumerated in section 52 from the scope of the statutory rights conferred by section 14 of the act. Consent of the copyright holder is irrelevant to the scope of the exclusion under section 52 of the Copyright act. Prayer a) therefore clearly seeks to over-ride the Copyright Act, 1957 itself in respect of works in which the plaintiffs claim a right.

VII. Why IRRO cannot be the answer

A. Very Restricted Copying Allowed even After Purchase of Licence

Page 3 of the licence issued by IRRO to Indraprastha University reveals that even after purchase of a blanket license, no more than 20 copies can be made and each copy cannot have more than 10% or one chapter of any publication and also provides that licensed copies may not be made or used for the delivery of education or training of any third-party and may be made and used for training of authorised persons provided that the licensee does not receive any consideration or any form of remuneration.

B. Several authors/ publishers are not part of IRRO repertoire

Further, IRRO does not hold authority to license all publications, only those belonging to select publishers. For copyright owners outside of the IRRO repertoire - by the plaintiff's interpretation of the law - IRRO licence will not authorize copying and teachers making copies for pupils will be in violation of the law, unless they seek and procure a licence for such copying from every copyright owner.

C. Right To Educational Material Cannot Be Left To The Vagaries Of Private Treaty

Students' right to educational material cannot be left to the vagaries of private treaty between commercial publishers and universities - either in the form of reprography licence or other commercial arrangements - especially in the light of the explicit legislative mandate of clauses 52 (1) (i) (i) and 52 (1) (a) of the Copyright Act. Through the present proceedings, the plaintiffs attempt is to subvert the mandate of the law and read the limited monopoly conferred by the Copyright act over-broadly and the specific exclusions from that monopoly too narrowly.

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VIII. Why Section 33 A does not provide an answer

A. Section 33 A is a limited jurisdiction to remove "unreasonable element, anomaly or inconsistency"

Section 52 (1) (i) explicitly provides for a different dispensation when it comes to the educational context and excludes the educational sphere from the operation of the rights conferred by sections 14 and 51 of the Copyright Act. Section 33 A by contrast is a provision of general application with no specific relevance to the educational sphere. Tariff Schemes can be reasonable, consistent and not anomalous and yet price educational and learning materials so exorbitantly as to place them beyond the reach of the majority of students. The experience of advanced countries, including UK, Canada, Singapore and Australia, where there are provisions for statutory authorities to review the reasonableness of a Tariff Scheme have clearly shown that such provisions are no protection against exorbitant tariffs.

B. Rule 57 stipulates that the Board in determining the Tariff Scheme will take into consideration prevailing standards of royalties in regard to such commercial exploitation of works and such other matters as may be considered relevant

The wording of section 33 A and Rule 57 suggest that the provisions have no specific relevance to the educational context.

The importance of the right to education and of access to learning materials find no relevance to determining unreasonable element, inconsistency and anomaly. Instead, unreasonable element, inconsistency and anomaly are to be understood in the context of prevailing standards of royalties for such commercial exploitation of works.

C. Section 33 A is completely ill-equipped to protect the interests of students since it can only be activated by an "aggrieved person" and does not provide suo moto powers in the Copyright Board to revise Tariff Schemes

Teachers or pupils, aggrieved persons who might have locus standi to challenge a Tariff Scheme in so far as it applies in an educational context cannot be expected to have the wherewithal to challenge the reasonableness of a Tariff Scheme

D. IRRO itself challenges the interpretation placed on section 33 A by the Plaintiffs

Blogpost <http://spicyip.com/2013/11/book-publisher-irro-challenge-constitutionality-of-copyright-amendments-and-rules.html> - indicates that IRRO has joined other petitioners to challenge the constitutionality of the latest amendments to the Copyright Act and its Rules. The post states that in that petition, IRRO argues that the power conferred by S. 33 A (2) is limited and allows the Board to remove only an 'inconsistency, anomaly, or unreasonable element' in the tariff scheme on appeal by an aggrieved person. IRRO also argues that the Rules go beyond the Act in allowing the Board to suo moto issue guidelines for tariff and that is in excess of the powers conferred by the Act. IRRO also contends that if a wide interpretation is given to the words of the S. 33A, it will render this section arbitrary and unconstitutional. Rule 57 has also been challenged on the basis that it exceeds the Act as it allows the Board to 'determine the tariff scheme', whereas, IRRO contends, the Act only allows the Board to remove certain elements of the scheme but does not allow them to review the entire scheme.

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E. In the context of the heavy reliance by the plaintiffs on IRRO, it is a necessary party to these proceedings and the suit is bad for non-joinder

The Plaintiffs have deliberately not made IRRO party to these proceedings in order that they can claim that section 33 A provides safeguard against unilateral increase of tariffs while at the same time arguing that section 33 A is of narrow application

IX. Photocopying of the kind sought to be injuncted is also protected by section 52 (1) (a), since it involves 'transformative authorship'

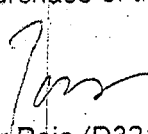
That the suit is barred by section Section 52 (1) (a) (ii) of the Copyright Act, since the averments in the plaint establish that it seeks injunctive reliefs in respect of fair dealing in the course of criticism or review.

In many instances, the compilations themselves, even sans tutorial and lecture, are of such a character as to amount to works of transformative authorship in the context of their use in a university, among teachers and students. This is particularly because:

- i) the material is photocopied as part of a collection put together to be studied by students and for use during the period of a course through lectures and tutorials
- ii) the photocopied material does not merely supplant the original works but alters it with new expression, meaning and message
- iii) the study material is different in character and not a mere substitute for the original work
- iv) photocopies of study material prescribed by teachers can have use for nobody apart from students of that particular course since they are put together for the specific purposes of that course.
- v) persons who wish to purchase the original work that is prescribed as part of the course and photocopied are not likely to purchase the study material instead.
- vi) In addition, photocopies are ephemeral and are no replacement for the physical copy of the book except for the limited purposes of studying for a specific course, since they fade rapidly off the page.
- vii) the object of making the copies available is to enable students to gain an understanding of the concepts being taught as part of the syllabus and not to profit any of the defendants
- viii) No market harm is caused to any copyright holder due to photocopy of study material sought to be injuncted by the suit

Even if one were to assume *arguendo*, some loss to copyright holders due to photocopying of the kind sought to be injuncted in this suit in the short run, such loss is clearly offset by the expansion of the market for such material caused by the University prescribing the material as syllabus. Chapter extracts that students are required to read as part of syllabus introduce them to the literary works and effectively serve as advertisements for the purchase of the full book.

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