

Annexure - Y

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IN THE HIGH COURT OF DELHI AT NEW DELHI

(Ordinary Original civil Jurisdiction)

CS(OS) No. 2439 of 2012

**The Chancellor, Master & Scholars of The University of Oxford**

*trading as Oxford University Press & Ors.* ... Plaintiffs

*Versus*

**Rameshwari Photocopy Service & Ors.** ... Defendants

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Place: New Delhi

Saikrishna &amp; Associates

Date: 19<sup>th</sup> November, 2014.

Advocates for the Plaintiffs

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**IN THE HIGH COURT OF DELHI AT NEW DELHI**

*(Ordinary Original Civil Jurisdiction)*

I.A. No. 14632 of 2012

in

C.S. (O.S.) No. 2439 of 2012

In the Matter of:

The Chancellor, Master and Scholars of the

University of Oxford & Ors.

... ..

Plaintiffs

Versus

Rameshwari Photocopy Service & Anr.

... ..

Defendants

**NOTE OF SUBMISSIONS ON BEHALF OF THE PLAINTIFFS**

**Issue:**

The question for consideration in this proceeding is whether the Defendants' practice of photocopying substantial portions from various copyrighted publications belonging to the Plaintiffs and in some cases photocopying the entire copyrighted publication, and thereafter selling copies thereof to students in the form of 'course packs'/anthologies or books, amounts to infringement as per Section 51 of the Copyright Act 1957.

**List of Important Dates:**

Appointment of a Local Commissioner - 14th August, 2012: The suit was first heard on 14<sup>th</sup> August, 2012, on which date the court gave directions for appointment of a local commissioner to visit the premises of the Defendant No.1, make an inventory of all the 'course packs' containing Plaintiffs' publications and seize/seal the same.

The local commissioner's report contains the following important findings:

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of Civil Procedure, 1908, for clarifying/modifying/vacating the injunction order dated 17th October, 2012, which is pending before this Hon'ble Court.

Impleadment of Defendant No. 3 and 4 - 1st March, 2013 and 12th April, 2013: Entities named Association of Students for Equitable Access to Knowledge (ASEAK) and Society for Promoting Educational Access and Knowledge (SPEAK) were impleaded as the Defendant No.3 and the Defendant No. 4 respectively, in this proceeding.

**Important Facts:**

1. The Defendant No.1 has photocopied substantial portions of the Plaintiffs' publications and stocked them in the form 'course packs' for immediate 'on the counter' sale. <sup>5</sup>
2. In the samples filed along with the Plaint, the extent of copying in a 'course pack' ranges from 5% to 100% from a single copyrighted work. <sup>6</sup> Pertinently, extracts from individual publications are included in different 'course packs' and hence the portions copied from Plaintiffs' publications is much more than what is reflected by this 'course pack'-by-'course pack' view of the sample purchases.
3. In addition to photocopying and selling substantial portions of the Plaintiffs' publications, the Defendant No.1 also engages in 'cover to cover' copying of the Plaintiffs' publications. <sup>7</sup>
4. These 'course packs' and 'cover to cover' copies are based on the syllabi issued by the Defendant No.2 University. The Plaintiffs' publications and the exact page numbers to be copied are provided in the syllabi. <sup>8</sup>

<sup>5</sup> Page 1 of the Local Commissioner's Report.

<sup>6</sup> Table provided at Pages 816 to 822 of the Plaintiffs' Compilation Vol. II

<sup>7</sup> Sample filed at Pages 1588 to 1781 of the Documents filed with Plaint as well as Inventory at Page 15 of the Local Commissioner's Report.

<sup>8</sup> Course pack present at Pages 11- 315 of the documents filed with Plaint is based on the syllabi filed at Pages 1783 to 1882 of the documents.

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5. That some of the works copied by the Defendant No.1 are part of the collection of the Ratan Tata Library, Delhi School of Economics, University of Delhi and are supplied to the the Defendant No.1 for such copying
6. That in order to ascertain the association between the Defendant No.1 and the Defendant No.2, the Plaintiffs' addressed an application under Right to Information Act 2005 ["RTI"] to the Central Public Information Officer of the Defendant No.2 on 24<sup>th</sup> April 2012. <sup>9</sup> A reply dated 4<sup>th</sup> May 2012 was received to the RTI which informed that the University has rented its premises to the Defendant No.1 in exchange of 3000 pages of free copying every month. The reply also claimed that the University plays no role in the day to day functioning of the Defendant No.1.
7. The Defendant No.1 is copying the Plaintiffs' publications along with their covers, which includes the copyright declarations that are prima facie proof of the Plaintiffs' exclusive rights.

**Defenses urged under Section 52 of the Copyright Act 1957:**

1. *Section 52 (1) (a): a fair dealing with any work (not being a computer programme) for the purposes of--*
  - (i) *Private or personal use, including research*
2. *Section 52 (1) (i): the reproduction of any work-*
  - (i) *by a teacher of a pupil in the course of instruction.*

**Legal Submissions:**

It is respectfully submitted that Section 52 of the Copyright Act, 1957 (unlike the 'Fair Use' defense applicable in the United States) is exhaustive and inflexible. Therefore, once the acts of the Defendant fall within the definition of 'infringement' under Section 51 and

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<sup>9</sup> Pages 1885 to 1887 of the Documents filed along with the Plaint

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cannot be exempted under any clauses of Section 52, no other defense is available to the Defendants.<sup>10</sup>

**I. SECTION 52 (1) (A): THAT THE DEALING IN THE PRESENT CASE IS NOT FOR THE PURPOSES OF PRIVATE OR PERSONAL USE**

It is submitted that the defense enshrined in Section 52 (1) (a) is not available to the Defendants as they themselves do not engage in private or personal use.

Reliance in this regard is placed on *Sillitoe and Others v. McGraw-Hill Book Company (U.K.) Ltd*<sup>11</sup> wherein it was observed that "The onus of showing that an exception applies is on the defendants. Mr. Jeffs contended that section 6(1) is widely drawn and not limited to the actual student, so that if a dealing is fair and for the purposes of private study the subsection applies whether the private study in mind is one's own or that of somebody else. Here, he said, the dealing was for the purpose of private study by the examinees who would acquire the notes. I do not accept that argument. To my mind section 6(1) authorises what would otherwise be an infringement if one is engaged in private study or research. The authors of the Notes, when writing the Notes and thus "dealing" with the original work, were not engaged in private study or research. To my mind *University of London Press Ltd. v. University Tutorial Press Ltd.* [1916] 2 Ch. 601 at 613, affords some support for this view."<sup>12</sup>

Pertinently, Section 6 (1) of U.K. Copyright Act 1956 is in *Pari Materia* with Section 52 (1) (a) of the Indian Copyright Act, 1957.

<sup>10</sup> Tekla Corporation & Anr. Vs. Survo Ghosh CS (OS) 2412/2011, Judgment of 16<sup>th</sup> May 2014, Paragraph 16, filed along with note of submissions.

<sup>11</sup> [1983] F.S. R. 545 ; Pages 339 to 352 of Plaintiffs' Compilation Vol. 1

<sup>12</sup> Page 347 of Plaintiffs' Compilation Vol. 1

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It is submitted that private or personal use must be that of the copier.<sup>13</sup> The relevant purpose is that of the person "doing the copying". Since the copiers in this case (the Defendant No. 1, or as a matter of fact even the University) are not themselves dealing with the work for the purposes of their private or personal use, such copying is not covered under this defense.<sup>14</sup>

It is further submitted that, when a copy is made on behalf of a person covered by this defense, it is implicit that there must be a request for supply by such person who is receiving the copy, and not a supply generated at the instance of a University or a commercial photocopy shop, such as the Defendant No.1.<sup>15</sup> The local commissioner's report suggests that the Defendant No.1 has stocked these 'course packs' for immediate 'on the counter' sale.<sup>16</sup>

**II. THAT THE ACTS OF THE DEFENDANTS ARE NOT COVERED UNDER SECTION 52 (1) (I) OF THE COPYRIGHT ACT, 1957.**

That Section 52 (1) (i) should be interpreted in light of India's International Obligations.

It is submitted that India being a signatory to the Berne Convention for the Protection of Literary and Artistic Works ["Berne Convention"] and the Agreement on Trade-Related Aspects of Intellectual Property Rights Agreement ["TRIPS"], has an obligation to standardise limitations and exceptions to exclusive rights, in accordance with the "Three Step Test".<sup>17</sup> Therefore, every copyright exception is required to be restricted to "certain special cases". It is submitted that the right granted even in "special cases" is not absolute

<sup>13</sup> Longman Group Ltd. v. Carrington Technical Institute Board of Governors [1991] 2 NZLR 574 (H.C.); Page 15 Last Para

<sup>14</sup> Copyright Licensing Authority v. University of Auckland [2002] 3 NZLR 76 (NZHC); Para 52

<sup>15</sup> Copyright Licensing Authority v. University of Auckland [2002] 3 NZLR 76 (NZHC); Para 59 and Longman Group Ltd. v. Carrington Technical Institute Board of Governors [1991] 2 NZLR 574 (H.C.); Page 16

<sup>16</sup> Inventory of 'course packs' seized, annexed to the Local Commissioner's Report at Page 10-14

<sup>17</sup> Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works and Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

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essential therefore is to see that the expanding area in which the copyright will have a role to play is covered. While India is a signatory to the International Covenants, the law should have been amended in terms thereof. Only because laws have not been amended, the same would not by itself mean that the purport and object of the Act would be allowed to be defeated. If the ground realities changed, the interpretation should also change. Ground realities would not only depend upon the new situations and changes in the societal conditions vis-a-vis the use of sound recording extensively by a large public, but also keeping in view of the fact that the Government with its eyes wide open have become a signatory to International Conventions.<sup>24</sup>

It is submitted that in interpreting the domestic/municipal laws, the Hon'ble Supreme Court has extensively made use of International law *inter alia* for the following purposes:

- (i) As a means of interpretation;
- (ii) Justification or fortification of a stance taken;
- (iii) To fulfill spirit of international obligation which India has entered into, when they are not in conflict with the existing domestic law;
- (iv) To reflect international changes and reflect the wider civilization;
- (v) To provide a relief contained in a covenant, but not in a national law;
- (vi) To fill gaps in law.<sup>25</sup>

In light of the aforesaid, it is respectfully submitted that Section 52 (1) (i) ought to be interpreted, as submitted herein below, keeping in mind India's obligations under the Berne Convention and the TRIPS. A pervasive interpretation of Section 52 (1) (i) allowing unfettered reproduction of Plaintiffs' publications, would cause considerable damages to the Plaintiffs' market, thereby failing the 'Three Step test' and hence, would be contrary to India's obligations under International conventions.

<sup>24</sup> Page 379 of Entertainment Network (India) Ltd. Vs. Super Cassettes Industries Ltd. 2008 (37) PTC 353 (SC), available at Page 167 of the Plaintiffs' Compilation Vol. I

<sup>25</sup> *Ibid.*



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and the reproduction must not conflict with normal exploitation of the work and must not unreasonably prejudice the legitimate interests of author.<sup>18</sup> It is submitted that, if the contemplated reproduction would be such as to conflict with normal exploitation of the work, it is not permitted at all.<sup>19</sup> If a reproduction does not conflict with normal exploitation, it would then be checked for any unreasonable prejudice to the legitimate interests of author.<sup>20</sup> It is submitted that if a photocopy shop makes a large number of copies of copyrighted material and hands them out to students, there would be serious loss of business for the copyright owner, and hence such an interpretation to Section 52 (1) (i) shall fail the "three-step-test" and cannot be allowed.<sup>21</sup>

It is submitted that even Article 10 of the Berne Convention, which provides for certain free uses of works for teaching, allows member countries to *permit utilization only to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice*.<sup>22</sup>

#### Application of the principles of the International Copyright Conventions in India

It is submitted that Hon'ble Supreme Court while interpreting Section 31 of the Copyright Act 1957, in *Entertainment Network (India) Ltd. Vs. Super Cassettes Industries Ltd.*<sup>23</sup> has observed the following:

*"If the right of an author/society is so pervasive, is it necessary to construe the provisions under Section 31 of the Act having regard to the International Covenants and the laws operating in the other countries? The answer to the said question must be rendered in affirmative. Interpretation of a statute cannot remain static. Different canons and principles are to be applied having regard to the purport and object of the Act. What is*

<sup>18</sup>Ibid.

<sup>19</sup> Guide to the Berne Convention for the Protection of Literary and Artistic Works, WIPO Publication No. 615 (E); Para 9.7 at Page 30 of the Plaintiffs' Compilation Vol. I

<sup>20</sup> Guide to the Berne Convention for the Protection of Literary and Artistic Works, WIPO Publication No. 615 (E); Para 9.8 at Page 31 of the Plaintiffs' Compilation Vol. I

<sup>21</sup> Guide to the Berne Convention for the Protection of Literary and Artistic Works, WIPO Publication No. 615 (E); Para 9.8, 9.10 & 9.12 at Page 31 of the Plaintiffs' Compilation Vol. I

<sup>22</sup> Article 10 (2), Berne Convention for the Protection of Literary and Artistic Works

<sup>23</sup> 2008 (37) PTC 353 (SC); at Pages 141 to 181 of the Plaintiffs' Compilation Vol. I

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Defense is available to a teacher or a pupil only and not to an educational institution or its licensee.

It is submitted that the defense provided under Section 52 (1) (i) of Copyright Act 1957, is available only to a teacher and pupil, as opposed to the Defendant No.1 or a university. It is submitted that a division bench of this Hon'ble Court has clarified in *Syndicate of The Press of The University of Cambridge on Behalf of The Chancellor, Masters and Scholars Vs. B.D. Bhandari & Anr*<sup>26</sup> that the defense under Section 52 (1) (i) is available to a teacher or pupil, i.e. a person giving or receiving instruction, and not otherwise.

It is submitted that there is a qualitative difference between each individual teacher/pupil performing the task of reproduction for himself/herself and an institution/photocopy shop performing the task on a wholesale basis for sale to students.<sup>27</sup> It is respectfully submitted that, otherwise, if institutional use were covered under this exception, then it would be acceptable for any publishing house to distribute copies of educational works, without payment of royalty, on a non-profit basis, and that clearly is not so.<sup>28</sup>

It is submitted that Clause (i) contemplates a singular instance of copying by a teacher or a pupil as opposed to large scale institutionalised copying and sale of 'course packs' by an educational institution like the Delhi University and/or its commercial photocopy shop like the Defendant No.1. It is submitted that the Copyright Act 1957, draws a distinction between a teacher or a pupil and an educational institution on the whole. This position is clear from a conjoint reading of clauses (h), (i) and (j) of Section 52 of the Copyright Act 1957.

It is submitted that, while the term 'educational institution' finds mention in Section 52 (1) (h) [as present prior to Copyright Amendment Act, 2012] and Section 52 (1) (j), the term 'a teacher or a pupil' is used in Section 52 (1) (i). It is submitted that use of the article "a" is in itself indicative of the personal nature of reproduction contemplated under this clause, as is the fact that this clause does not refer to an 'educational institution'.

<sup>26</sup>2011 47 PTC 244 (Del.) (DB); Para 63; at Page 247 of the Plaintiffs' Compilation Vol. I

<sup>27</sup> Nimmer on Copyright, Volume 4 By Melville B. Nimmer; Page 13-248, at Page 764 of the Plaintiffs' Compilation Vol. II

<sup>28</sup> *Ibid.*

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<p>Section 52 (1) (i):</p> <p>the reproduction of any work:</p> <p>(a) by a teacher or a pupil in the course of instruction</p>	<p>Section 32:</p> <p>Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction</p>	<p>Section 44: Copyright in a literary, dramatic, musical, or artistic work or the typographical arrangement of a published edition is not infringed by the copying of the whole or part of the work or edition if—</p> <p>(b)the copying is done—</p> <p>(i)in the course of preparation for instruction; or</p> <p>(ii)for use in the course of instruction; or</p> <p>(iii)in the course of instruction;</p>
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Section 52 (1) (i) covers only 'Reproduction' and not 'Publication'

It is submitted that Section 14 of the Copyright Act 1957, gives two distinct rights to the owner of copyright, i.e. reproduction and publication. While the term 'reproduction' covers copying in any material form, including storing by electronic means, the term 'publication' as defined in Section 3 of the Act means making a work available to the public by issue of copies or by communicating the work to the public. In other words, the right of 'reproduction' allows only making of a copy and, in order to issue such copy/copies to the public, a separate right of 'publication' steps in.

It is respectfully submitted that Section 52 (1) (i) merely gives the right of 'reproduction', i.e. a teacher or a pupil can make a single copy of a work 'in the course of instruction'. However, making multiple copies and distributing the same would amount to 'publication',

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a right which is not granted under Section 52 (1) (i). It is submitted that right of 'publication' for educational purpose is provided under Section 52 (1) (h) of the Act, subject to the restrictions mentioned therein.

It is submitted that a conjoint reading of various clauses of Section 52 makes it clear that the legislature has used the terms 'reproduction' and 'publication' selectively and separately, based on the respective rights intended to be given. For instance, even in the case of judicial proceedings, the Act prescribes two different clauses. While Section 52 (1) (d) allows reproduction for the purpose of a report of a judicial proceeding, Section 52 (1) (q) (iv) allows reproduction or publication of any judgment or order of a court. It is respectfully submitted that, if Section 52 (1) (d) could itself have been extended to cover both 'reproduction' to report a judicial proceeding as well 'publication' of the judgment itself, there would have been no need for the legislature to provide for Section 52 (1) (q) (iv).

That Section 52 (1) (i) has to be interpreted keeping in mind other provisions of the Copyright Act, 1957 and the purport and object of the Copyright Act, 1957. That a right to a commercial photocopy shop in an educational institution to engage in unauthorised copying of an entire copyrighted work, or substantial portions thereof, and to issue copies thereof to students, would render other educational exceptions under Section 52 otiose.

Section 52 (1) (h) and Section 52 (1) (i)

It is submitted that publication of copyrighted matter in a collection ('course pack') for use by an educational institution is covered under Section 52 (1) (h) and not Section 52 (1) (i). It is submitted that Section 52 (1) (h) allows publication of a collection, for use by an educational institution, mainly composed of non-copyright matter, of short passages from published literary works, not themselves published for such use in which copyright subsists. It is submitted that Section 52 (1) (h) further provides that not more than two such passages from the same author shall be published during any period of five years.

It is submitted that, while Section 52 (1) (h) imposes restrictions of use by an educational institution of only two passages on copying for instructional use in cases of collections

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mainly composed of non-copyright matter, it is inconceivable that Section 52 (1) (i) would allow an educational institution to copy larger portions for collections mainly composed of copyrighted matter, for the same purpose.

Section 52 (1) (o) and Section 52 (1) (i)

It is submitted that admittedly the Defendant No.1 is acting under the direction of Ratan Tata Library, the library of the University's Delhi School of Economics. It is submitted that activity of the Defendant No.1 would therefore be subject to the restriction imposed by Section 52 (1) (o) of the Copyright Act, 1957.

It is submitted that Section 52 (1) (o) allows a non-commercial library such as the Ratan Tata Library to make only three copies of a book for its own use and only in instances where the book is not available for sale in India. It is respectfully submitted that the Defendant No.1, claiming to be a licensee of the Delhi School of Economics, cannot have a greater right than its Licensor itself has. Therefore, even if the Defendant No.1 were to be equated with the Institute itself, it cannot be permitted to make more than three copies and that too for books not available in India. Thus, the argument of the Defendants that Section 52 (1) (i) allows an educational institute to make several copies of an entire book and distribute such copies to all its students, without payment of any royalty, is flawed.

Section 52 (1) (zb) and Section 52 (1) (i)

It is submitted that Section 52 (1) (zb) provides certain special rights of adaptation, reproduction, and issue of copies to facilitate persons with disability. As per Section 52 (1) (zb), any person can reproduce and issue copies of any work to facilitate access to such work by persons with disability, for private or personal use, educational purpose or research. It is submitted that the intention of this clause is to provide access to persons with disability in case the available format would otherwise preclude enjoyment of such work by persons with disability.

The proviso to Section 52 (1) (zb) provides that such copies of works are to be made available on a non-profit basis and only to recover the cost of production. It further provides that the organisation concerned shall ensure that such copies of works are used

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become widespread it would adversely affect the potential market for the copyrighted work<sup>32</sup>.

It is submitted that the Defendants are making non-transformative use of the Plaintiffs' publications and copying all portions which are relevant to a student in a course of study, therefore diminishing the need for original textbooks and licensed content of the Plaintiffs, whether as sales of the whole or license in part, under licence from the Indian Reprographic Rights Organisation ["IRRO"]. It is respectfully submitted that the 'Fair Dealing' defense will thus certainly fail in the present case.

An analysis of each of the factors regularly considered by Courts in determining whether dealing is fair or not is submitted herein below. It is submitted that these factors have been laid considering the 'Fair Use' analysis followed in the United States and factors laid by the Canadian Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*.<sup>33</sup>

- Effect of Dealing on the work

It is submitted that there can be no doubt that these 'course packs' are commercially competing with the Plaintiffs' books and their license from the IRRO and act as a substitute to them. It is stressed that the entire syllabi prescribed for a semester is sold to students in the form of 'course packs' thereby negating the need to purchase original copies of or licensed content from Plaintiffs' publications. It is further submitted that, not only will the impugned acts of the Defendants amount to loss of sales for the Plaintiffs' books, but these acts also negate the potential licensed use of the copyrighted works at issue, i.e. licensing to copy portions of these works for inclusion in 'course packs' through the IRRO. It is submitted that the potential destruction of the licensing stream of revenue is sufficient to negate 'fair dealing' in the instant case.<sup>34</sup>

- Available alternatives to the dealing

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<sup>32</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 at 590 (1994); *Harper & Row Publishers Inc. vs. Nation Enterprise and Nation*, 471 U.S. 539 at page 271-306 of the Plaintiffs' Compilation Vol. I

<sup>33</sup> 2004 SCC 13; Para 52 to 60; at Page 726 to 728 of the Plaintiffs' Compilation Vol. II

<sup>34</sup> *Princeton University Press Vs. Michigan Document Services, Inc.*, 99 F.3d 1381; Page 8; at Page 432 of the Plaintiffs' Compilation Vol. II

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It is respectfully submitted that the business in which the Defendants are engaging is licensed the world over by Reprographic Rights Organizations which license the photocopying/reproduction of content for the benefit of educational establishments and their students on payment of a nominal license fee. In India, the IRRO, a registered Collecting Society under Section 33 of the Copyright Act 1957, is responsible for the issuance of licenses to educational institutions such as the Defendant No. 2, so that the student community has access to licensed photocopies of relevant portions of the syllabi. It is submitted that the Plaintiff Nos. 1, 2 and 4 are members of the IRRO and have therefore authorized the said Society to issue licenses and collect license fees on their respective behalves. It is therefore submitted that the Defendants, having access to an effective alternative mechanism to the unlicensed taking of the Plaintiffs' copyrighted works, i.e. the IRRO, can have no justification for such large scale institutionalised copying of substantial portions or the whole of copyrighted works and for depriving the Plaintiffs and their authors of the revenue from sales and authorized licensing of such works to which they are entitled.

- The purpose and character of the dealing

It is submitted that what is challenged in this suit is the photocopying of copyrighted works for sale by the Defendant No.1 (a for profit organization), in collaboration with the Defendant No.2 University.<sup>35</sup> There can be no doubt that the Defendant No.1 is copying and selling 'course packs' on a profit-making basis. It is submitted that admittedly a separately identified sum is being charged to students for every 'course pack', which is in excess of the cost of photocopying per se.

It is submitted that it is not open for an educational institution to authorize large scale institutionalized copying, by means of contractual arrangements with a commercial photocopy shop.<sup>36</sup> It also needs to borne in mind that the Defendant No.2 University receives 3000 copies free of cost from the Defendant No.1 in return of facilitating the

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<sup>35</sup> Princeton University Press Vs. Michigan Document Services, Inc., 99 F.3d 1381; Page 6; at Page 430 of the Plaintiffs' Compilation Vol. II

<sup>36</sup> Princeton University Press Vs. Michigan Document Services, Inc., 99 F.3d 1381; Page 9; at Page 433 of the Plaintiffs' Compilation Vol. II.

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commercial activity of the Defendant No. 1 and thereby profits from the sale of such 'course packs'.

It is therefore wrong to suggest that the Defendants' dealing in the present case is non-commercial in nature.

It is submitted that even if one presumes that the use in the present case is educational and not for profit, the use cannot be insulated from a finding of infringement on this ground alone<sup>37</sup>. It is submitted that while analysing the "nature and character of dealing", due credit should also be given to the fact that use of the Defendants is non-transformative in nature. The Plaintiff's publications have been copied verbatim in this case and the Defendants' course packs supersede the original creations of the Plaintiffs. Further, the Defendants' course packs have the same intrinsic purpose (of at least one of the purpose) as served by the Plaintiff's publications<sup>38</sup>.

It is submitted that the Defendants' use being commercial in nature and non-transformative, this factor is also against the Defendants.

- The nature of the work

The nature of the subject works is not in dispute. The excerpts copied for these 'course packs' are original creative expressions from academic publications of the Plaintiffs, and are protected as 'literary works' under the Copyright Act 1957.

- The amount and substantiality of the portion used

The substantiality of the portion copied in the present case is also not in dispute. It is submitted that, from the samples filed along with the Plaintiff, the Defendants are using as much as 100% from one copyrighted work in a given 'course pack' and in no case is such usage less than 5%<sup>39</sup>, which clearly is substantial quantitatively. Pertinently, extracts from individual publications are included in different 'course packs' and hence the portions

<sup>37</sup> Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569.

<sup>38</sup> Cambridge University Press & Ors. Vs. Carl V. Patton & Ors. Case No. 12-14676 before the United States Court of Appeals, Eleventh Circuit.

<sup>39</sup> Table provided at Pages 816 to 822 of the Plaintiffs' Compilation Vol. II



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copied from Plaintiffs' publications is much more than what is reflected by this 'course pack'-by-'course pack' view of the sample purchases.

It is submitted that some of the publications copied by the Defendants are edited volumes of independently authored chapters. The 'relevant work' in the case of an edited volume is the chapter copied and not the entire volume. The Defendants by copying an entire chapter from such edited volumes are copying 100% of the work. In addition, the Defendants have also engaged in 'cover to cover' copying of entire publications.

It is submitted that the question whether a substantial portion of the work is reproduced is a question to be decided not merely on the basis of the number of pages, but also based on the quality of the content being copied<sup>40</sup>. The fact that the entire syllabi prescribed for a course of study is being copied in this case is ample evidence of the qualitative value of the copied material.<sup>41</sup>

**IV. THAT THE ACTS OF THE DEFENDANTS CANNOT BE ALLOWED IN THE LARGER PUBLIC INTEREST**

It is submitted that mass unauthorized photocopying of books in and around educational institutions results in huge loss of revenue for the publishing industry. Without this revenue, publishers cannot continue to invest in the creation of new educational material and the broad dissemination of educational material. The effect of this photocopying is therefore not simply loss of revenue for publishers, but loss of material for the benefit of students in India and elsewhere.<sup>42</sup> With ever greater technological advances in methods for the making of inexpensive photocopies, the problem is becoming increasingly acute every

<sup>40</sup> Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Harper & Row Publishers Inc. vs. Nation Enterprise and Nation, 471 U.S. 539 at page 271-306 of the Plaintiffs' Compilation Vol. I

<sup>41</sup> Princeton University Press Vs. Michigan Document Services, Inc., 99 F.3d 1381; Page 9; at Page 433 of the Plaintiffs' Compilation Vol. II.

<sup>42</sup> Study on Copyright Piracy, sponsored by Ministry of Human Resource Development, Government of India, at Page 845 of the Plaintiffs' Compilation Vol. II

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year.<sup>43</sup> It is submitted that the Defendants, while arguing that their actions are in the interest of the student community, are overlooking the tremendous reduction in the value of the copyrighted works that necessarily results from a consistent and pervasive application of mass photocopying practices ultimately harm the student community.<sup>44</sup>

It is submitted that, if a substantial number of schools/universities were to begin to follow the practices of the Defendant No.2 University of purchasing a single copy and supplying numerous copies through photocopying, the publishers' core market for copyrighted educational materials would be obliterated.<sup>45</sup> This would well discourage authors from creating works of educational nature and publishers from publishing the same. It is submitted that the entire object and purpose of providing copyright protection to authors and publishers will be doomed if copyright protection is effectively obliterated merely by a university prescribing academic materials in its syllabi.

It is respectfully submitted that it is necessary to strike an appropriate balance between the authors'/publishers' interest in preserving the copyright in their works as needed to enable sustainable ongoing publication and dissemination and students' ability to enjoy the benefits of academic content. In the respectful submission of the Plaintiffs, this balance is provided by the licensing mechanism of the Indian Reprographic Rights Organisation, as explained herein above.

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<sup>43</sup> Study on Copyright Piracy, sponsored by Ministry of Human Resource Development, Government of India, at Page 845 of the Plaintiffs' Compilation Vol. II ; Nimmer on Copyright, Volume 4 By Melville B. Nimmer; Page 13-239, at Page 756 of the Plaintiffs' Compilation Vol. II

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*