Annexure 'A A'

2855

IN THE HIGH COURT OF DELHI AT NEW DELHI

(Ordinary Original Civil Jurisdiction)

I.A. No. 14632/2012
In
CS (OS) No.2439 of 2012

In the Matter of:

The Chancellor, Master & Scholars of the University of Oxford trading as Oxford University Press & Ors ... Plaintiffs

Versus

Rameshwari Photocopy Services & Ors ... Defendants

INDEX

S. No.	Particulars	Page no.
1	Note of Arguments on behalf of Defendant no. 4	1-16
2.	**Annexure A**: Relevant extract of the article "Exhausting Copyrights and Promoting Access to Education: An Empirical Take", Basheer et al, 17(4) JIPR (2012)	17-19
3.	**Annexure B:** Relevant extract of the article "Exceptions and Limitations in Indian Copyright Law for Education: An Assessment" Lawrence Liang, The Law and Development Review, , Vol.3, Issue 2, July 2010	20-24
4.	**Annexure C:** Printouts of the news reports from Canada and New Zealand	25-27
5.	**Annexure D:** Printouts of the articles regarding the growth of Publishing Industry in India	28-40

Recd 10/12/14 12.55 PM. OK

New Delhi

Date: 10.12.14

Swathi Sukumar,
Advocate for the Defendant no.4
D-10, Lower Ground Floor,
Nizamuddin East
New Delhi – 110013
011-41088652

2856

IN THE HIGH COURT OF DELHI AT NEW DELHI

I.A. No. 14632/2012
In
C.S. (OS) 2439/2012

In the Matter of:

The Chancellor, Master and Scholars of the University of Oxford & Ors. ...Plaintiffs

Versus

Rameshwari Photocopy Services & Ors. ...Defendants

WRITTEN SUBMISSIONS ON BEHALF OF DEFENDANT NO.4, SOCIETY FOR PROMOTIONAL ACCESS AND KNOWLEDGE (SPEAK)

The Defendant abovenamed humbly submits as under:

1. SPEAK is a registered society consisting of academics and faculty members at various Universities. The Defendant has filed these written submissions in relation to the application for interim injunction filed by the Plaintiff.

2. These written submissions cover the following issues:

I Interpretation of Section 52 (1) (i)

A. What are Course Packs?
B. Who is this exception available to?
C. Is the copying "in the course of instruction"?
D. The scope of the term "Reproduction"
E. The Necessity Test
F. Interface between sections 52 (1) (h) and section 52 (1) (i)

II Fair Dealing exception under section 52 (1) (a)

A. "The Four Factor" Test
B. Copyright as a balance: Interpreting fair dealing provisions

III IRRO License

A. The IRRO license, by its intent and language entirely negates the rights of students and faculty members under the Indian Copyright Act, 1957.
B. The IRRO licensing arrangement confers unfettered power on the IRRO to control access to educational materials

IV Plaintiffs' Submissions on International Law

V Grounds for declining Interim Relief

I. INTERPRETATION OF SECTION 52 (1) (I)

The text of section 52 (1) (i) is set out below:

"Section 52. Certain acts not to be infringement of copyright. - (1) The following acts shall not constitute an infringement of copyright, namely:

...

(i) the reproduction of a literary, dramatic, musical or artistic work-
 (i) by a teacher or a pupil in the **course of instruction**; or
 (ii) as part of the questions to be answered in an examination; or
 (iii) in answers to such questions;"

In considering the nature of this exception, the following issues must be examined:

A. What are Course Packs?

While the term "course packs" does not have a definitive dictionary meaning, it is broadly used in the Indian context to refer to any collection of excerpted readings from a variety of text books and other written materials, aimed at exposing students to a diversity of readings and thoughts in a certain area of study, and organised according to a course outline/syllabus designed by the University/faculty in charge.

B. Who is this exception available to?

The Plaintiffs have repeatedly sought to argue that Defendant No.1, Rameshwari Photocopiers, are a commercial unit selling the Plaintiffs' publications and making a profit of them. The Plaintiffs have alleged that the photocopier cannot avail of the exception under section 52 (1) (i).

This is factually incorrect because Rameshwari is an agent and licensee of the University. The license agreement between the University and Rameshwari contains stipulations on (a) location of the shop; (b) charge per page; and (c) working hours.

The agreement also clearly mentions that the photocopy shop would only provide services to *bona fide* students, teachers and staff of DSE and authorized users of the Ratan Tata Library. It was specifically barred from taking any "outside jobs".[1]

The rate of photocopying is fixed in the license agreement at a nominal 40 paisa per page by Defendant No. 2 (Delhi University) itself, at the time of filing of the present suit.[2] As per estimates and the prices offered by others in the area, this is a highly competitive price and one of the lowest rates in the city for such work.

The agreement clearly states that Rameshwari would have to bear all the capital, maintenance, furniture-related, operational, utility and ancillary costs.[3] There are also labour costs associated with borrowing and returning of books, as well as the mechanical process of photocopying itself, which are also to be borne by the licensee – Defendant No.1, Rameshwari.[4]

Thus, a minimum of 40 paisa per page is necessary to cover the expenses associated with discharging such a service and earn a small profit in order to make the photocopy shop a

---

[1] *See* Clause 6 of the License Agreement which states 'the Licensee will provide the service only to the bonafide students, teachers, staff of the Delhi School of Economics and authorized users of the Ratan Tata Library and will not undertake any outside job'.

[2] Clause 8 of the License Agreement states "The Licensee will charge a uniform rate of 40 paisa per page. The pages will be of superior quality".

[3] Clause 2 says that "The capital as well as the maintenance costs of equipment, ancillaries and furniture and all other operational expenses will be borne by the licensee"

Clause 11 states "The Licensee will be responsible for maintenance and proper upkeep of the property under his use".

Clause 14 states that "the Licensee must pay for the full electricity charges as per the dedicated meter involved".

[4] Clause 13(viii) states that "Borrowing and returning is to be the responsibility of the Vendor".

sustainable enterprise. However, there is no separate premium charged for the "content" of the photocopy—rather the charge is limited to the expenses incurred on the paper, ink and electricity irrespective of what content the page that is being photocopied actually bears.

The dissenting judgement of Boyce R. Martin, J. in the decision of the Court of Appeal in the United States in *Princeton University Press, etc. v. Michigan Document Services Inc. & Anr.*, is particularly instructive:

"That the majority lends significance to the identity of the person operating the photocopier is a profound indication that its approach is misguided. Given the focus of the Copyright Act, the only practical difference between this case and that of a student making his or her own copies is that commercial photocopying is faster and more cost-effective. Censuring incidental private sector profit reflects little of the essence of copyright law. Would the majority require permission fees of the Professor's teaching assistant who at times must copy, at the Professor's behest, copyrighted materials for dissemination to a class, merely because such assistant is paid an hourly wage by the Professor for this work?

The majority's strict reading of the fair use doctrine promises to hinder scholastic progress nationwide. By charging permission fees on this kind of job, publishers will pass on expenses to colleges and universities that will, of course, pass such fees on to students. Students may also be harmed if added expenses and delays cause professors to opt against creating such specialized anthologies for their courses. Even if professors attempt to reproduce the benefits of such a customized education, the added textbook cost to students is likely to be prohibitive.

The Copyright Act does not suggest such a result. Rather, the fair use doctrine contemplates the creation and free flow of information; the unhindered flow of such information through, among other things, education in turn spawns the creation and free flow of new information.

In limiting the right to copy published works in the Copyright Act, Congress created an exception for cases like the one before us. When I was in school, you bought your books and you went to the library for supplemental information. To record this supplemental information, in order to learn and benefit from it, you wrote it out long-hand or typed out what you needed –not easy, but effective. Today, with the help of free enterprise and technology, this fundamental means of obtaining information for study has been made easier. Students may now routinely acquire inexpensive copies of the information they need without all of the hassle. The trend of an instructor giving information to a copying service to make a single set of copies for each student for a small fee is just a modern approach to the classic process of education. To otherwise enforce this statute is nonsensical. I therefore dissent." [paragraphs 67-69]

Also relevant is the dissenting judgment given by Merrit, J.:

"Neither the District Court nor our Court provides a rationale as to why the copyshops cannot "stand in the shoes" of their customers in making copies for non-commercial, educational purposes where the copying would be fair use if undertaken by the professor or the student personally". [paragraph 75]

In the present case, the emphasis on the identity of the copier is a red herring, intended only to confuse the issue before the Hon'ble Court. Defendant No.1 is an agent who enables the exercise of a lawful right that the students and faculty members enjoy under the Copyright Act, and the Plaintiffs' decision to target the photocopier belies *mala fide* intentions on their part to eviscerate a valuable public policy exception enshrined in the Copyright Act for the benefit of educational institutions and their students.

C. Is the copying "in the course of instruction"?

Section 52(1) (i) uses the phrase "in the course of instruction". While there are no Indian cases that shed light on what activities are covered under the phrase, "course of instruction", case law from other countries that have provisions of law that are *in pari materia* with section 52 (1) (i), provide useful insights.

In New Zealand, the Copyright Act, 1962 contained the following provision (the Act has been amended subsequently). Section 21 (4) of the Act stated:

> *"(4) The copyright in a literary, dramatic, musical, or artistic work is not infringed by reason only that the work is reproduced, or an adaptation of the work is made,---*
>
> *(a) In the course of instruction, whether at a University or school or elsewhere or by correspondence, where the reproduction or adaptation is made by a teacher or student; or*
> *(b) As part of questions to be answered in an examination, or in answer to such a question."*

The phrase "course of instruction" was interpreted in the case of *Longman Group Ltd. v. Carrington Technical Institute Board of Governors*, [1991] 2 NZLR 574, and the court observed 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.*
>
> *"The course of instruction", when it encompasses correspondence, must enable preparation of the material to be used in the course of instruction and copying of material to be used in the course of instruction by a teacher before the delivery of the instruction. Equally it could not be said a blackboard transcription of copyright work prior to a class was not in the course of instruction.*
>
> *It cannot, therefore, be said that copying by other means prior to a class is not in the course of instruction, provided it is for the course of instruction."* [page 17]

Therefore, the Plaintiffs' argument that section 52 (1) (i) should be read to mean copying of a work in the classroom is contrary to the language used and the statutory intent. Preparatory work for a class, including preparation of course packs is squarely covered by the exception. The Plaintiffs' argument would essentially mean that each classroom must be fitted with a photocopier and the copying must be in the clasroom at the precise point in time when the subject matter under discussion and the copied material tally on all fours. Apart from the ludicrousness of such a suggestion, one can imagine the sheer non-feasibility of implementing such a cost-heavy and inefficient policy in a resource-constrained country such as India, where a majority of students continue to struggle to meet even their regular tuition fees in specialised higher education programmes that require familiarity with a broad range of readings.

D. The Scope of the term "Reproduction"

Section 52(1) (i) of the Act exempts 'reproduction' generally, and does not specifically provide for the process or means to be employed in such reproduction. This is particularly significant since several common law jurisdictions such as the UK[5] have strictly demarcated the bounds of the educational exception - stating specifically that the exception would not extend to reproduction by reprographic means (namely mechanical and automated means such as photocopying). Further, some countries have specifically prohibited reproduction in 'digital' form.[6] Other countries that contain such limitations within their copyright law include Hong Kong[7] and Singapore.[8] By not containing any such limitation, it is clear that

---

[5] Section 32 of the UK Patents, Designs and Copyrights Act, 1988: *Things done for purposes of instruction or examination. (1) 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, provided the copying-- (b) is not done by means of a reprographic process.*

[6] Article 53 of the UrhG (German Law of Copyright).

[7] Hong Kong Copyright Ordinance Cap 528 s 41(1): (1) *Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied, to a reasonable extent, in the course of instruction or of preparation for instruction, if the copying- (b) is not by means of a reprographic process.*

section 52(1) (i) of the Indian copyright act envisages reproduction of any kind, including by reprography or digital means. This distinction is a very important one to bear while analysing the applicability of precedent from the UK and other countries.

E. Does the exception permit full-text copying of books?

The Plaintiffs submit that section 52(1)(i) cannot be used to permit wholesale reproduction of copyrighted works.

Section 52(1)(i) permits the reproduction of any work by a teacher or student in the course of instruction. However, such reproduction must bear a rational nexus to the valuable educational purpose goal enshrined in this exception. In other words, it cannot be used to reproduce a full text of a book when that book is otherwise readily available in the market at an affordable price.

Secondly it cannot be used to permit a full text copy, when the entire text is not necessary to fulfill the educational goal of the course in question. It is important to appreciate that modern day higher education is aimed at instilling a critical thinking faculty amongst students. This necessarily means that students cannot merely just read and parrot information but have to review and assimiliate it with a view towards critically reflecting on it. Course packs offeirng a diversity of excerpted reading material from different texts fulfills this important goal and is thereore extremely valuable from a pedagogical purpose. However, at times, a teacher or instructor may teach directly from 1-2 text books. In such cases, the text should not be reproduced cover-to-cover under the guise of this exception unless it is not available readily in the market and/or unaffordable by Indian standards.

Unfortunately, a number of higher education books are exorbitantly priced and/or not available (as the latest edition) in the Indian market as amply documented in empirical studies undertaken.

For instance, the following extract from an article written by Shamnad Basheer and others[9] is useful:

"***Issue 1: Availability of Book Titles in India***

> *As noted earlier. The two national law school libraries (NLS and NUJS) acquired around 1554 foreign titles during the period between January 2009 and February 2011. Of these foreign titles, very few boasted equivalent low priced Indian editions. Moreover, the vast majority of these low priced editions were older edition that lagged an edition or two behind their Western counterparts.*
>
> *Illustratively, consider a book titled 'Principles of corporate finance', published by McGraw-Hill. When compared with a tenth edition that was being sold in the US and UK at the time of collecting this data the low priced Indian version was still in its eight edition (an edition first introduced in the Western markets in 2007).*
>
> *It was also found that in rare instances where the Indian edition corresponded with the latest international edition, the Indian edition was introduced much latter than the corresponding version in Western markets. An example is 'Microeconomics', the seventh edition of which was being sold in both India and internationally at the time of collecting the data. However, while this edition was first introduced in the Western markets in 2008, it took more than a year before this edition was introduced in India in 2009.* (internal page 340)
>
> And later
>
> *"Purchasing Power*
>
> *.....The issue of access to educational books in India often depends on the*

[8] Section 50A(1) of the Singapore Copyright Act, 1988: *Copyright in a work is not infringed by its being copied for the purposes of a course of education, provided the copying -- (a) is done by a person conducting or undergoing the course of education; and (b) is not by means of a reprographic process.*

[9] Basheer et al, *Exhausting Copyrights and Promoting Access to Education: An Empirical Take*, 17(4) JIPR (2012).

purchasing power of the average Indian student. The GNIPC comparative Price Tabled indicate the relevant price of a book in direct proportion to the gross national income per capita (GNIPC) of the country where it is sold, namely, India, the US, UK and Netherland.

Illustratively, consider a book by Tsepon Wangchuk Deden Shakabpa. which costs 269 (or US$371) on the publisher's website. If buyers in the US had to pay the same percentage of their income on this book as an average Indian, the book would cost approximately US$ 5236; a ludicrously high price by any standard! Even a comparatively more' affordable book such as the Politics of Global Governance: International Organization in an Interdependent world' by Diehl and Frederking, which costs US$ 26.50, ends up costing US$ 373.93, on this relative GNIPC based metric; more than 14 times its original price! It is obvious that Indian Purchasers have to spend a significantly higher percentage of their income to purchase international edition of books, in comparison to buyers in the West." (internal page 341)

An article written by another scholar, Lawrence Liang[10] addresses the issue of purchasing power of Indians in general as against the price of books in India:

"*First, absolute prices of books may often be higher in the global South than in the global North. Second, consumers in the South have to commit significantly higher proportions of their income to buy these books. Third, if consumers in the United States had to pay the same proportion of their income towards these books as their counterparts in South Africa and India, the results would be ludicrous: $1027.50 for Mandela's Long Walk to Freedom and $941.20 for the Oxford English Dictionary. It is instructive then, to note that the prospect of paying $440.50 for Roy's God of Small Things in the United States is manifestly alarming, whereas, paying $6.60 for the book in India (which in Indian terms is exactly the same value as $440.50 in the United States, by this logic) is not treated with similar outrage.*" (internal page 206)

Both articles have been handed over during the course of hearings before this Hon'ble Court, however, for the ease of reference, the relevant extracts of the articles are annexed herewith as **Annexures A and B**, respectively.

F. Interface between sections 52 (1) (h) and section 52 (1) (i)

The Plaintiffs have repeatedly argued that the provision applicable to preparation of course packs is section 52 (1) (h) and not section 52 (1) (i). This argument is manifestly incorrect on a plain reading of the statute.

Before the amendments to the Copyright Act in 2012, Section 52 (1) (h) was numbered sections 52 (1) (g). The unamended section is reproduced below:

"*(g) the publication in a collection, mainly composed of non-copyright matter, bona fide **intended for the use of educational institutions**, and so described in the title and in any advertisement issued by or on behalf of the publisher, of short passages from published literary or dramatic works, not themselves published for the use of educational institutions, in which copyright subsists :*

Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years..."

After the 2012 amendments, the provision was renumbered as section 52 (1) (h) and reads as follows:

"*(h) the publication in a collection, mainly composed of non-copyright matter, bona fide **intended for instructional use**, and so described in the title and in any advertisement issued by or on behalf of the publisher, of short passages from published literary or dramatic works, not themselves published for such use in which copyright subsists;*

Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years..."

[10] Lawrence Liang, *Exceptions and Limitations in Indian Copyright Law for Education: An Assessment*; The Law and Development Review, Vol.3, Issue 2, July 2010

"Instructional use" is a term that refers to all kinds of instruction, for example, in non-educational settings, such as corporate trainings, instruction manuals for electronic devices etc.

After the 2012 amendment, there is no room for doubt that all reproduction of works in educational institutions are covered by section 52 (1) (i) and not by section 52 (1) (h).

Another critical difference between these two provisions (section 52 (1) (i) and (h) is as below:

Section 52 (1) (h) speaks of the liberty to create a "publication" which could well be circulated to any member of the public (as a regular publisher is free to disseminate any of their works to all and sundry, and upon a charge that accounts for the cost of creating the publication as well as the cost of the content itself). Whereas section 52 (1) (i) is limited to copying for the educational use of select beneficiaries (students within an educatioanl ecosystem); as such, the mateirals cannot be "published" as such (i.e. created and circulated to the general public).

Secondly, section 52(1) (h) is limited to literary and dramatic works, whereas the educational exception in section 52(1) (i) clearly envisages all copyrighted works, including musical works, an important consideration for students of music in an educational institution.

II FAIR DEALING EXCEPTION UNDER SECTION 52 (1) (A)

Without prejudice to the arguments made above in relation to section 52 (1) (i), the answering Defendant submits that the University and its students are covered by the "fair dealing" exceptions under section 52 (1) (a).

Section 52 (1) (a) reads in pertinent part as below:

"(1) The following acts shall not constitute an infringement of copyright, namely:

(a) a fair dealing with any work, not being a computer programme, for the purposes of—

(i) private or personal use, including research;
(ii) criticism or review, whether of that work or of any other work;"

The Canadian decision in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*[11] ['**Alberta**'] makes clear that even if teachers photocopy materials with a view to distribute them to their students, it is with a view to enabling the "private" or "personal" use of such materials by students. The court held that 'instruction' and 'research/private study' are unified purposes that are fused together.[12] Hence, copying of extracts from textbooks for classroom use is a permissible exception to copyright. It is irrelevant whether the copying is done by the teacher (on the request of a pupil or without) or the student itself, and whether the actual copying is done within the classroom or outside. In pertinent part, the court held that:

> *"[T]his does not mean, however, that the copier's purpose is irrelevant at the fairness stage. If, as in the "course pack" cases, the copier hides behind the shield of the user's allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair, that separate purpose will also be relevant to the fairness analysis.*
>
> *[23] In the case before us, however, there is no such separate purpose on the part of the teacher. Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of "instruction"; they are there to facilitate the students' research and*

[11] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* [2012 SCC 37].

[12] *Id.*

private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological." [paragraphs 22 and 23]

Therefore, in the current fact situation, a University licensed photocopy shop created for the sole purpose of enabling the making of copies for students, of course outlines and course packs, is clearly within the purview of the fair dealing exception above, as it enables a student to use a work for his/her own private or personal use. In other words, either the student can photocopy these works herself, or the University can enable such photocopying.

Further the photocopies of course packs are with a view to enabling students to read and review the content therein, so as to make for a meaningful discussion in class. This fosters and enables the larger educational goal of not merely parroting content that is studied, but of reviewing it and critically analysing it. The design of most course packs is with a view to fostering this larger policy goal.

As for whether or not the dealing is a "fair" one, the below factors become relevant.

A. "The Four Factor" Test

In order to assess the 'fairness' of any use of copyrighted material, American courts have long employed a four-factor test for determining 'fair use' of the work. Courts in India and in Canada have also applied a similar test for evaluating 'fair dealing' of any copyrighted material.

The Delhi High Court in *Syndicate of the Press of Cambridge v. Bhandari* observed that:

> *"There are four non-exclusive factors that determine whether any particular use counts as fair use or an infringement. These four factors are: (i) The purpose and character of the copyright use, including whether such use is of a commercial nature or is largely for nonprofit educational purposes; (ii) The nature of the copyrighted work itself; (iii) The substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) The effect of the use upon the potential market value of the copyrighted work."* [paragraph 34]

It is, however, cautioned that the above factors are merely 'illustrative' and not a definite test for assessment of fairness.

i. ***Purpose and character of the use, including whether such use is of a commercial nature or is largely for non-profit educational purposes***

The fair dealing exception is not available when the purpose of use of is for 'commercial exploitation'. In *Rupendra Kashyap v. Jiwan Publishing House*, (1996) 38 DRJ 81, the Delhi High Court applied the test of 'commercial exploitation' and observed that if a publisher commercially exploits the original work (and in doing so, infringes the copyright) the defence of fair dealing would not be available, even if the book published by him is used, or meant to be used for research or private study.

In the present case, course packs contain readings prescribed by the faculty for the purpose of the course. Therefore, the photocopying of Plaintiffs' titles by the Defendants cannot be deemed as 'commercial exploitation' of the work.

The photocopy shop that is specifically licensed by the University to photocopy reading materials and create course packs is bound by strict terms, including rates to be charged. Such rates are one of the lowest photocopying rates in the vicinity and reflect the bare minimum costs incurred for the copy, and do not include a premium for the "content" itself. As such, this can hardly qualify as commercial exploitation of Plaintiffs' works,

but rather valid educational uses of the same in pursuance of a legitimate exception in the Copyright Act.

ii. *Nature of the copyrighted work*

The Canadian Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004 SCC 13) explained that:

> *"The nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work — one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair. See Beloff v. Pressdram Ltd., [1973] 1 All E.R. 241 (Ch. D.), at p. 264."* [paragraph 58]

A number of suit authors, who have authored the books named by the Plaintiffs in their plaint ("Suit Authors"), have registered a strong protest against the present suit claiming that such a valid educational use is in their own interests, as it leads to more dissemination of their writings.

They realise that students are not the appropriate audience from a profit-making perspective, since students are often on tight budgets and cannot purchase all the books whose limited chapters and sections are excerpted for their readings.

Rather, enabling easy access of such works to students will invariably result in breeding more familiarity with their writings amongst students, and could convert into potential sales later when students become earning members.

All this is made clear in the joint letter signed by thirty three Suit Authors. This letter has been filed with the documents filed by Defendant No.4 at page 10.

In particular, an excerpt from a letter written by Kaushik Sunder Rajan, which is also filed with the Documents of Defendant No.4, is reproduced below :

"One thing I would like to say (and will happily say on record) is that for me, as an author, the ability to have my work photocopied in India has been absolutely essential. ...

*The *only* way in which my book has been read has been through photocopying, and I have given copies of my book to individuals in India explicitly requesting that they photocopy and distribute as widely as possible. Without this, my work would only have been read by primarily Euro-American audiences, which would have defeated the very purpose of my being an academic."*

iii. *Substantiality of the portion copied*

This proposition is best explained by the Canadian Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*:

> *"Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. If the amount taken from a work is trivial, the fair dealing analysis need not be undertaken at all because the court will have concluded that there was no copyright infringement. As the passage from Hubbard indicates, the quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work. As Vaver points out, there might be no other way to criticize or review certain types of works such as photographs: see Vaver, supra, at p. 191. The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique."* [paragraph 56]

Another case dealing with the issue is *Cambridge University Press* v. *Becker* (2012 WL 1835696 (N.D. Ga. May 11, 2012) (Northern District Court of Georgia)]

> ... *[the Court] disagrees with the suggestion that a professor's selection of an excerpt means that the excerpt is a critical part of the book. It is at least equally likely that the excerpt was selected because it filled a need within the course curriculum. A chapter of an academic book is a unit which, in all likelihood, covers a particular theory or topic, so as to make it suitable for use in a course which covers a broader, related overall subject matter. Because this case does involve strictly educational, nonprofit uses, it is relevant that selection of a whole chapter of a book (either from a typical, single author chapter book or from an edited book) likely will serve a more valuable educational purpose than an excerpt containing a few isolated paragraphs. Professors want students to absorb ideas and useful, context-based information. This can be accomplished better through chapter assignments than through truncated paragraphs.* [internal page 68]

Therefore it is submitted that the quantum of pages photocopied from books mentioned in the plaint is not 'substantial' in relation to the copyrighted work considered as a whole.

Altough numerical qualifiers are not determinative of the fair dealing issue, it is important to appreciate that even on a numerical quantitative touchstone, the takings from copyrighted works are very minimal.

The average number of pages copied from each book is less than 10%.

a. Course Pack I filed with the Plaint : 8.99
b. Course Pack II filed with the Plaint : 9.97
c. Course Pack III filed with the Plaint : 19.55
d. Course Pack IV filed with the Plaint : 7.396

iv. ***Effect on market value of the copyrighted work***

The Canadian Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004 SCC 13) explained that:

> *"...the effect of the dealing on the work is another factor warranting consideration when courts are determining whether a dealing is fair. If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair..."* [paragraph 59]

As reiterated earlier, course packs cannot be said to compete with the main books, portions of which are excerpted into the course pack in accordance with a carefully designed syllabus and course outline. Rather, course packs are created solely within the four walls of an educational institition and meant for limited circulation to students. Even authors recognise that students are not their customers (for purchase of books), but that there is a crying need to enable easy access and circulation of their works to students within the broad rubric of an educational exception. The signed declaration of a number of Suit Authors filed with the Written Statement filed by Defendant No.4, bear testimony to this powerful sentiment.

In the present case, all the tests of fair dealing are met, for the following reasons:

i. The purpose of the work is to provide affordable access to publications for students. It is for non-commercial educational use. The fact that the photocopier's rates are regulated under a strict University license, and meant to cover only photocopying costs and not include a premium on the "content" of course packs, ensures that it qualifies even more strongly as non-commercial educational use.
ii. In some cases, the Plaintiffs' suit publications are not available even on their own website. In these cases, the Defendants are serving the crucial function of providing access to these books to the students. An investigation into the Plaintiffs' official

web portal revealed that 28 books out of 130 books mentioned in the plaint are not available. A list of these books has been filed in the present proceedings.

iii. The Plaintiffs have not been able to demonstrate that the Defendants' course packs borrow substantially from their works, either qualitatively or quantitatively. The attached table contains details on the percentage of each of the Plaintiffs' publications copied, which demonstrates that the extracts are insubstantial quantitatively. The Plaintiffs have not even made an averment that there is substantial qualitative copying, and therefore the question does not arise.

iv. The Defendants' course packs do not compete with the market for the Plaintiffs' publications. The extracts are inadequate to replace the Plaintiffs publications in the market, no matter how many copies of these extracts have been made.

v. Further, the onus of proving that these books do in fact compete with the Plaintiffs' publications will require the Plaintiffs to lead evidence for each of the publications in question, and the burden has not been discharged at the interim stage.

B. Copyright as a balance: Interpreting fair dealing provisions

While introducing amendments relating to educational exception in the Copyright (Amendment) Bill, 2012, the then Human Resource Development Minster, Kapil Sibal stated that:

> "*The sixth issue is, of course, the exceptions and limitations to copyright. All rights must have limitations. That is underlying in every right in the Constitution of India, whether it is the freedom of speech or the freedom of expression or the freedom to move anywhere in India or the freedom to do trade or the freedom to form associations. So, every right must have a concomitant obligation and restriction. So, even these rights must have restrictions. What are those restrictions? If a student wants to do research in copyrighted material, he cannot be charged. If somebody wants to do research in copyrighted material or wants to teach something, he cannot be charged. If I want to use copyrighted material in a debate in this House, I cannot be charged for that. If I want to use it in a judicial proceeding, I cannot be charged for that. Therefore, naturally, it is necessary to have those restrictions.*"

Courts have also consistently emphasized the importance of striking a balance between the rights of copyright owners on one hand and the public on the other hand.

The Canadian Supreme Court *Alberta (Education)* v. *Canadian Copyright Licensing Agency (Access Copyright)* (2012) viewed fair dealing as a 'user's right' than an 'exception' to copyright.

> "*As noted in the companion appeal SOCAN v. Bell, fair dealing is a "user's right", and the relevant perspective when considering whether the dealing is for an allowable purpose under the first stage of CCH is that of the user (CCH, at paras. 48 and 64). This does not mean, however, that the copier's purpose is irrelevant at the fairness stage. If, as in the "course pack" cases, the copier hides behind the shield of the user's allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair, that separate purpose will also be relevant to the fairness analysis.*" [paragraph 22]

This is an important conceptual argument and ensures that copyright defences/exceptions are not seen as limited concessions, but are to be interpreted purposively and in a robust manner as user entitlements or rights. These users' rights to access works and build on them form an important component of the copyright bargain, and it is important to ensure that copyright regimes are not interpreted purely in a copyright owner centric manner.

It is pertinent to note that Indian decisions have viewed copyright law as a 'balance' between rights of authors and objectives of access to information of users. The Supreme Court in *M/s Entertainment Networks Ltd. v. Super Cassettes* (2008(9) SCR 165 stated that:

> "*The Act seeks to maintain a balance between the interests of the owner of the copyright in protecting his works on the one hand and the interest of the*

public to have access to the works, on the other. The extent to which the owner is entitled to protection in regard to his work for which he has obtained copyright and the interest of the public is a matter which would depend upon the statutory provisions. Whereas the Act provides for exclusive rights in favour of owners of the copyright, there are provisions where it has been recognized that public has also substantial interest in the availability of the works... " [paragraph 33]

The Division Bench of the Delhi High Court in *Syndicate of the Press of Cambridge v. Bhandari* (2011), observed that:

> "*33. The doctrine of fair use then, legitimizes the reproduction of a copyrightable work. Coupled with a limited copyright term, it guarantees not only a public pool of ideas and information, but also a vibrant public domain in expression, from which an individual can draw as well as replenish. Fair use provisions, then must be interpreted so as to strike a balance between the exclusive rights granted to the copyright holder, and the often competing interest of enriching the public domain. Section 52 therefore cannot be interpreted to stifle creativity, and the same time must discourage blatant plagiarism. It, therefore, must receive a liberal construction in harmony with the objectives of copyright law. Section 52 of the Act only details the broad heads, use under which would not amount to infringement. Resort, must, therefore be made to the principles enunciated by the courts to identify fair use.*" [paragraph 105]

The answering Defendant submits that the exceptions under Section 52, in particular the educational exception under section 52 (1) (i) and the fair dealing provision under section 52 (1) (a) are user's rights and not merely 'exceptions' to the rights of the authors.

(i) This interpretation is not repugnant to the text of Section 52;
(ii) This interpretation is consistent with the broader objectives of the legislation and the intent of the legislature to promote a valuable societal goal, namely access to affordable education.

III THE IRRO LICENSE

A. The IRRO license, in form and effect, completely negates the rights of students and faculty members under the Copyright Act, 1957:

The Plaintiffs' arguments on the IRRO are factually and legally incorrect. An IRRO license would only be required in law, if the use by the University of a copyrighted work falls *outside the exceptions* contained in the Copyright Act, and not otherwise.

An extract from a recent decision fated 17th October 2014 of the Court of Appeals in the Eleventh Circuit, in the United States in *Cambridge University Press & Ors. V. Carl. V. Patton et al*, is instructive in this regard:

> "*Of course, any unlicensed use of copyrighted material profits the user in the sense that the user does not pay a potential licensing fee, allowing the user to keep his or her money. If this analysis were persuasive, no use could qualify as "nonprofit" under the first factor. Moreover, if the use is a fair use, then the copyright owner is not entitled to charge for the use, and there is no "customary price" to be paid in the first place.*" [page 70]

However, the IRRO license deliberately negates the exceptions under sections 52 (1) (a) and 52 (1) (i) of the Copyright Act. Paying the IRRO for such an exempted use effectively amounts to converting a valid copyright exception into a compulsory license provision. This goes against the intent of Parliament, and against the wording of the statute.

An extract of the IRRO license that was in use at the time of filing the suit is below:

- *"The licensee must own an original and/or copyright fee-paid of any Licensed Material it copies or scans under the terms and conditions of the license.*
- *Licensee can make no more than 20 copies and **<u>not copy more than 10% or 1 chapter</u>** of any publication of any publication per year whichever is the greater."*

The license was revised since the suit was filed, and the current IRRO license filed by the Plaintiffs reads as follows:

- *The licensee must own an original and/or copyright fee-paid of any Licensed Material it copies or scans under the terms and conditions of the license.*
- *Licensee can make copies for the number of students on a course of study, as a course pack only, and **<u>not copy more than 15% or 1 chapter</u>** of any publication of any publication per year whichever is the greater."*

This revision made by the IRRO to the license terms is a mere eye-wash because the license continues to charge royalty for use of the material, where such use is expressly permitted under sections 52 (1) (i) and 52 (1) (a) of the Copyright Act.

The fact that the IRRO charges educational institutions for all photocopying from 1-15% demonstrates the fact that in the IRRO's view, that faculty members and students cannot even copy a single page without their permission. This "licensing" arrangement is in effect a compulsory licence, and a complete negation of the statutory exceptions contained in the Copyright Act, 1957 in favour of the Defendants.

B. The IRRO licensing arrangement confers unfettered power on the IRRO to control access to educational materials

Although the IRRO may claim to charge low licensing fees at this stage, there is nothing to prevent them from escalating the fees to the detriment of Universities and students once they have their foot in the door. This is not a mere hypothetical worry, but has come to pass in other jurisdictions where Universities that faced the brunt of this steep increase finally decided to break their licensing arragement with equivalent reprographic rights organizations and take recourse to a fair use exemption for their copying.

News reports from Canada and New Zealand covering disputes between Universities and publishers over unilateral fee increases, are filed herewith as **Annexure C.** These reports foretell the future of education in India if Universities begin entering into license agreements for legitimate use of copyrighted materials. Universities will be forced to reduce access to educational materials and to increase the cost of education. This increase in cost will dramatically cripple the ability of students to access education.

IV PLAINTIFFS' SUBMISSIONS ON INTERNATIONAL LAW

The Plaintiffs referred to the TRIPS Agreement and to the Berne Convention while arguing that the exceptions under the Copyright Act ought to be construed narrowly.

1. **International law may be referred to only when there is a void in domestic law.**
   It is a settled principle that international law may be referred to where there is a void in domestic law. In the present case, the exceptions under Copyright Act provide unambiguously wide prescriptions under section 52. The exception under section 52 (1) (i) is particularly wide without any quantitative fetters, as are imposed in the laws of other countries. Therefore, reference to international law is not appropriate.

2. Even while interpreting domestic statutes in light of international law, some leeway must be granted for implementation in light of local requirements[13]

3. In case of a conflict between international law and domestic law, domestic law takes precedence.[14]

4. Without prejudice to the foregoing, even when international obligations are sought to be imported into domestic law, the content of the international obligations ought to be clear. In the present case, there is significant dispute on the content and interpretation of the TRIPS and the Berne Convention obligations, and a domestic court is not an appropriate forum to decide the dispute. This dispute will have to necessarily be decided by an international dispute resolution forum.

V GROUNDS FOR DECLINING INTERIM RELIEF

There are four grounds for declining interim relief:

(i) Concealment of Material Particulars:

Course packs have been in use in India, including the Delhi University, for more than a decade. The Plaintiffs have been operating worldwide for over two centuries and in India through a subsidiary, at least since 2004.

Yet, the Plaintiffs conveniently claim that the cause of action arose in April 2012, when they sent their agent to visit the University premises. This is a demonstrably false statement about the Plaintiffs' date of knowledge, and aside from amounting to perjury, it disentitles the Plaintiffs to any relief.

In *S.P. Chengalvaraya Naidu (dead) by L.R.s v. Jagannath (dead) by L.Rs*, (1993) (6) SC 331, it was held that a party obtaining a preliminary decree withholding of important document from the Court deserves to be thrown out at any stage of litigation. In *Welcome Hotel v. State of Andhra Pradesh*, AIR 1983 SC 1015, the Court held that a party misleading the Court to obtain a favourable decree is disentitled to be heard on merits of the case.

(ii) No *prima facie* case

The answering Defendant reiterates its submissions made above. In particular the Defendants' activities are squarely covered by the literal language of section 52 (1) (i), a valuable educational exception deliberately inserted by Indian Parliament to achieve public policy educational goals. Alternatively, the said activities are covered under the fair dealing exception in section 52(1) (a).

The Plaintiffs have not filed copyright assignment or license agreements with authors in respect of several of the books that are named in the plaint.

(iii) Balance of Convenience in favour of the Defendants

The Plaintiffs have knowingly allowed photocopying of educational material for more than a decade. In light of the above, the balance of convenience lies in favour of the Defendants, and hence injunction should be set aside. The activity of photocopying and creating course packs in educational institutions has become a vital part of the educational process, and the balance of convenience lies in favour of continuance of this activity.

The Plaintiffs have not demonstrated how a continuation of this activity has harmed their economic interests, including *inter alia* by damaging the educational publishing industry.

---

[13] Indian Handicrafts Emporium v. Union Of India, AIR 2003 SC 3240

[14] Gramophone Company Of India Ltd v. Birendra Bahadur Pandey, AIR 1984 SC 667

They have made bare claims on losses suffered by them without placing any records or data before this Hon'ble Court to even make out a *prima facie* case of having suffered losses as claimed.

(iv) No irreparable harm to the Plaintiff

Irreparable harm is a *sine qua non* for grant of injunctions and the Plaintiffs have failed to demonstrate any irreparable harm arising out of a denial of injunction.

In the present case, there are no circumstances to indicate that the Plaintiffs will suffer irreparable injury that cannot be compensated by way of damages. The delay of over a decade in the filing of the present case, is itself demonstrative of the fact that there is no irreparable injury being suffered by the plaintiffs.

A. Loss is admittedly Quantifiable

Plaintiffs, on their own volition, proposed that the Defendants should seek a license from IRRO, and the IRRO has a scheme for making of course packs. In fact, by touting the IRRO as the feasible alternative and claiming that IRRO licensing fees would the way forward, Plaintiffs have effectively conceded that the injury is quantifiable in monetary terms in the form of licensing fees.

In the event the suit is decided in favour of Plaintiffs, the revenue that ought to accrue to them can be calculated using the proposed tariff scheme. Therefore, no ground exists for the grant of an interim injunction.

On the other hand, if an injunction is granted, it will cause grave and irreparable injury to the Defendants. For example, the student community can never be compensated for the loss of access to publications if the Plaintiffs suit is found to be unmaintainable at a later stage.

B. The Publishing Industry is robust in India despite the use of works within educational institutions:

With India's growing urban population and ever increasing literacy rates, the Indian academic publishing industry has seen a booming trajectory. As per FICCI estimates, the publishing industry is growing at a rate of 30%, with over 18,000 publishers doing business in the country.[15] India is one of the top six publishing countries in the world, and third largest in the English language.[16] The growth rates and the potential of the industry have attracted big international players such as Simon & Schuster and Bloomsbury to set up operations in India in 2011 and 2012 respectively.[17]

This growth in the Indian market is evident in the recent announcement of Harper Collins launching an educational division in India, as its "largest ever" investment in international education.[18]

The Indian publishing industry is valued at nearly $2 billion,[19] of which educational books and higher educational books dominate 60 per cent of the market share.[20] Several factors

---

[15] Jaya Bhattacharji Rose, The Economics of Electric Content, BusinessWorld, March 2013 available at http://www.businessworld.in/en/storypage/-/bw/the-economics-of-electronic-content/840935.37528/page/0

[16] Shri Nath Sahai, Publishing Industry on a Roll, Business Standard, May 2009 available at http://www.business-standard.com/article/opinion/shri-nath-sahai-publishing-industry-on-a-roll-109051700025_1.html

[17] http://www.bloomsbury.com/bloomsbury-india/; http://d2ikrwcyurm5vv.cloudfront.net/press_releases/Simon%20&%20Schuster%20India.pdf

[18] http://www.indiaincorporated.com/index/item/732-harpercollins-taps-into-indian-education-market.html

[19] http://www.firstpost.com/living/good-news-unlike-west-publishing-industry-growing-in-india-620000.html

[20] S. K. Ghai, Educational Publishing in India. Publishing Research Quarterly, December 2007, Volume 23, Issue 4, pp 278-282; Arun Wolf, India: Profiting by managing a propensity for chaos, Frankfurt Academic Quarterly, available at http://blog.book-fair.com/2013/02/11/faq-spring2013-india/

contribute to the attractiveness of the industry; the increasing market, the competitive rates for publishing and printing technologies, the relatively low competition from e-content (contrary to the market situation of developed countries) and supportive government policies. Given its importance in the advancement of education, the Government of India has made a commitment of $7.56 billion every year for a period of five years and has set aside $3.33 billion for 2010-11 for the publishing of books.[21]

True copies of all these articles are annexed herewith as **Annexure D.**

The activity of photocopying within educational institutions has been ongoing at least for the past decade if not longer, and the Plantiffs have not placed on record material that would even *prima facie* demonstrate that they have suffered any monetary losses.

Therefore, the Plaintiff suffers no harm at all if the educational exception is construed widely.

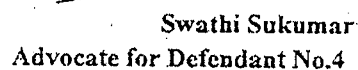
(v) Delay and Laches

The present suit is liable to be dismissed on the grounds of acquiescence, waiver, delay and laches. The activity of creating course packs and the mechanical reproduction of books is several decades old, and the Plaintiffs have neglected to take any action despite having their operations in India for several years and being fully aware of photocopying activity in universities.

The Supreme Court has repeatedly held that a Plaintiff who has acquiesced to an alleged infringement cannot belatedly approach the court for relief, and that its amounts to consent to the alleged infringing activity. The doctrine of acquiescence has been well recognized in the context of intellectual property rights..

In the present case, not only has there been laches and delay, but there has also been acquiescence, because the Plaintiffs have actively pursued other infringers since 2001 before this Hon'ble Court, and have deliberately chosen not to take action against the Defendants and against other Universities. These positive acts on the part of the Plaintiffs negate their claim for any equitable relief, including injunction.

3. In light of these submissions, it is humbly prayed that this Hon'ble Court be pleased to dismiss the Plaintiffs' application for interim injunction with costs, and may pass any order as it deems fit in the facts and circumstances of the case.



New Delhi
Dated: 10/12/14

Swathi Sukumar
Advocate for Defendant No.4

[21] http://www.printweek.in/Feature/284243,bookonomics-of-indias-exports.aspx