

An Analysis On The Principle Of Fair Dealing With Special Reference To Delhi University Photocopy Case

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ABSTRACT

Doctrine of fair dealing is an important part of Indian Copyright law. It permits reproduction of the copyrighted work or use in a manner, which, but for the exception carved out would have amount to infringement of copyrights. Sec 52 (1) (a) of the Copyright Act, 1957 provides for the legal provision as to fair dealing. Even though, it is a well established and well recognized principle, the doctrine of fair dealing is said to have got a new life through a landmark judgement in Delhi University Photocopy Case¹. To summarily state the decision, the Delhi high court held that the making of 'course packs' for the purpose of education was well within the bounds of the law and did not amount to copyright infringement. While many hail this judgment for promoting 'access to education', respectful disagreements exist with its legal reasoning, methods of interpretation and the resultant legal outcomes. The role photocopiers play in the lives of students is inevitable. Nevertheless, excess of anything is catastrophic at least to the exclusive copyright owners whose copyrighted work is subjected to extreme overuse and misuse by Photostatting. The idea behind granting copyrights to author of books is to promote literary work and secure the ideas which author wished to preserve and share only by legal publication which is being affected through this decision. Through this paper, the concept of fair dealing under Indian law is explained and it analyses the judgement of the case, explore the legality of photocopying of copyrighted work and extent to which copyrighted work is permitted to be photocopied.

Key words: Fair Dealing, Copyrights, Photocopy, Academic Purpose.

1. INTRODUCTION

Copyright is an exclusive right guaranteed under the law to do or authorise others to do certain acts in relation to literary, dramatic, musical, and artistic works; cinematographic films and; sound recordings. Section 14 of Copyrights Act, 1957 lists these items for which copyrights are extended. The objective of copyright law is to protect the creators of original works from any unauthorized access, use, reproduction or exploitation of their works.

¹ The Chancellor, Masters & Scholars of the University of Oxford & ors. v. Rameshwari Photocopy Services & anr.

Copyright law thus vest with the owners, certain rights as to their works. Violation of any of the rights will amount to infringement of copyrights. According to Corpus Juris Secundum infringement of copyright is a trespass on private domain of the owners of copyrights. Infringement thus consists of any act done without the consent of the copyright owners against their rights conferred on them by the law. Section 51 of Copyrights Act, 1957 provides for acts which amount to infringement of copyrights. The acts include encroachment upon owners' exclusive rights, permitting for profit without license any place to be used for the communication of the work to public where such communication constitutes infringement of copyrights and dealing in infringing copies. However, to serve the purpose of copyright laws as to promotion of creativeness, use and copying of copyrighted works to an extent, under certain circumstances are not considered as infringement. Section 52 of the Act provides for the acts that do not amount to infringement of copyrights. The main exception to infringement of copyrights under the provision is 'fair dealing' also known as 'fair use'. Fair dealing is thus an extra legal use which is customary, reasonable and usual. The Act provides 'fair dealing' of literary, dramatic, musical, artistic work of research or private study, criticism or review, as a defence against claim for infringement. Among various other acts provided under Section 52, scholarly use and educational uses are considered as 'fair dealing'. The Act however fails to provide use to what extent can be considered as 'fair use'. Delhi University Photocopy case gave a judgement that use of copyrighted material for the purpose of education is within the purview of law and does not amount to infringement of copyrights. But still there exist a question of doubt as to the extent of such uses and the criteria as to determining the actual purpose of using a copyrighted work. As the litigation continues, it can still be expected that the judiciary of the country might come up with a reasonable solution to the persisting problem.

2. PRINCIPLE OF FAIR DEALING

Fair Dealing principle is an exception to the infringement of copyrights. The principle allows replication, reproduction or use of a copyrighted work for certain purposes. The principle is considered as an integral part of laws relating to copyrights.² The concept of "fair dealing" initially originated as an equitable doctrine which allows the use of certain copyrightable works, which would otherwise have been prohibited and would have amounted to infringement of copyright. In *Harper & Row Publishers v Nation Enterprises*,³ it was held that prohibiting such uses 'would stifle the very power that the law is intended to foster'. Proponents of 'fair' copyright opine that copyrights don't guarantee an exclusive right as patents does. When it is so, fair use is a solution to balance the rights of copyright owners and users of copyrighted works. The principle acts as a thin line between the legitimate and bonafide use of a copyrighted work and illegitimate and malafide copy of the work. It also facilitates growth of creativity by ensuring access and use to copyrighted works. In fact, the purpose of Intellectual Property Laws is to promote creativity.

² The Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House and Ors, 2008 (38) PTC 385 (Del)

³ Harper & Row Publishers v Nation Enterprises, 471 US 539

Article 13 of the TRIPS⁴ incorporates the principle of Fair dealing. According to the provision, "*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder*". As all the member countries of WTO have to comply with the Berne Convention⁵ and TRIPS, the principle of fair dealing has been given a place in the municipal laws of member countries. However there are different approaches to this principle in different countries. While legislations of some countries has a rigid approach to this principle by providing a exhaustive list of acts that amounts to fair dealing while legislations of some countries has a lenient approach to accept any new act within the ambit of Fair Dealing. Laws of India and UK are examples for the countries which work strictly within the framework of the enlisted actions which constitute fair dealing, whereas American Laws provides for fair use as open for interpretation. When India and UK has specific statutory provisions which enumerates acts amounting to fair dealing and America has only certain guideline factors which help in determining the extent of "fairness" involved in accessing and using a work.

In India, Section 52 of Copyrights Act, 1957 has incorporated the principle of 'fair dealing'. However, it does not define what is fair dealing. English case, *Hubbard v Vosper*⁶ has been referred as an authority while dealing with many cases relating to fair dealing in Indian courts. In the case, it was stated by Lord Denning that it is actually impossible to define what amount to fair dealing. He considered fair dealing as a question of degree and matter of impression. It was also stated that an act should be recognized as 'fair dealing' based on various considerations. The statutory provision in India, which provides for 'fair dealing' has specified a set of acts that alone amount to 'fair dealing'. The acts include fair scholarly use, educational use, media reporting use, and use by public libraries etc. However, in order to keep pace with the scientific and technological development, the courts of the country started recognizing 'fair dealing' according to facts and circumstances apart from the statutory provisions. Apparently, courts have arrived at conclusions as to 'fair dealing' from the approaches followed by US and UK.

Through the case of *ESPN Stars Sports v. Global Broadcast News Ltd*, the judiciary in our country reiterated that it is impossible to develop a "rule of thumb" for cases of fair dealing as it must be developed upon in its own facts and circumstances.⁷ In *Kartar Singh Giani v. Ladha Singh*⁸, it was held that two points need to be considered urged in deriving meaning of the expression fair, in fair dealing. They are:

(1) In order to constitute unfairness there must be an intention to compete and to derive profit from such competition and;

⁴Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international agreement which was negotiated at the end of the Uruguay Round of the [General Agreement on Tariffs and Trade](#) (GATT) in 1994 and is administered by the WTO to all its members, and sets down minimum standards for the regulation by national governments of many forms of intellectual property (IP)

⁵ The Berne Convention for the Protection of Literary and Artistic Works, usually known as the Berne Convention, is an international agreement governing copyright, which was first accepted in Berne, Switzerland, in 1886.

⁶ *Hubbard v Vosper* (1972) 1 All ER 1023

⁷ *ESPN Stars Sports v. Global Broadcast News Ltd and Ors*, 2008 (36) PTC 492 (Del)

⁸ *Kartar Singh Giani v. Ladha Singh* (1935)ILR16LAH103

(2) Unless the motive of the infringers were unfair in the sense of being improper the dealing would be fair.

Taking a look in to US Copyright Law, it provides for determine fair use certain on balanced application of certain factors. The factors include, purpose or character of use, nature of the work being used, the effect of use on the potential value of or market for the work.⁹ The ambit of acts that amounts to fair use in itself is more in accordance with the statute apart from the nature of being open to consider more acts based on application of the above stated factors.

For an act to be infringement, the employment of a copyrighted work in it must be substantial, and for the use to be honest and within the purview of 'fair dealing', it should not be too substantial. Courts in India have applied each quantitative and qualitative check of the 'substantial use' factor. However, the literal use derived from the copyrighted works has not been a determinative issue. In *Williams & Wilkins Co v United States*¹⁰, the Supreme Court of US held that 'copying of an entire copyrighted work cannot ever be 'fair use.' It was also stated that this is an overbroad generalization to consider the extent of the copying as one important factor.

3. PHOTOCOPING OF COPYRIGHTED WORKS FOR EDUCATIONAL USE AS FAIR DEALING

Use of copyrighted works for educational purposes and in educational institutions does not amount to infringement of copyrights and is within the purview of fair dealing. Sections 52(1)(g), 52(1)(h), 52(1)(i) of the Copyrights Act provides for use of copyrighted works for educational purposes as exception from claiming infringement. What amounts to educational purposes under the provisions are as follows¹¹:

- Publication in a collection, mainly composed of non-copyrighted matter, bonafide intended for the use of educational institutions, of short passages from published literary or dramatic work which has not been published for the use of educational institutions, in which copyright subsists.
- Reproduction of literary, dramatic, musical or artistic work by a teacher or a pupil in the course of instruction or a part of questions to be answered in an examination, or in answers to such questions.
- Performance, in the course of activities of an educational institution, of a literary, dramatic, or musical work by the staff or students of any educational institution, or of a cinematograph film or a sound recording if the audience is limited to such staff and students, the parents and guardians.

From the said provisions, it can be inferred that there is no particular provision under Copyrights Act dealing with the issue of photocopying of copyrighted work for educational purposes. As the law doesn't specifically provide such provision, a look in to the laws of other countries and judicial decisions relating to the issue can be considered.

⁹ 17 U.S.C. § 107

¹⁰ *Williams & Wilkins Co v United States* 487 F.2d 1345 (Ct. Cl. 1973)

¹¹ Ishita Chatterjee, Copyright Law, Central Law Publication, (2011) at pp.99

In *Twentieth Century Music Corporation v. Aiken*¹² the Court expressed that securing public interest is primary objective of copyrights law and that purpose can be achieved by securing for the copyright owner "a fair return for an author's creative labour." In *Basic Books Incorporation v. Kinko's Graphic Corp*¹³ Kinko's was held to be liable for infringement of copyrighted work when it photocopied book chapters for selling to students as "course packs" for their university classes. The case took in to consideration, all the factors to determine fair dealing like nature, purpose, price, effect in market. Out of the four factors, three factors were against fair use and held that the photocopying in the said circumstance did not amount to fair dealing. In *Williams & Wilkins Co v United States*¹⁴, the court held that photocopying of journal articles by researchers will fall within the ambit of fair use. In *Sony Corp. v Universal City Studios*¹⁵ it was held that when a use increases the benefit to the public without causing substantial harm to the copyright owners, the goals of copyrights are served best by ensuring fair dealing. It was further stated that educational uses of copyrighted works, even the entire work falls within the ambit of fair dealing unless a potential substantial harm against the copyright owners exist. In *Authors Guild v. Hathi Trust*¹⁶, it was held that reproducing extracts from books in various ways (Photocopied or scanned) which is a permitted form of fair use. In *Alberta (Education) v. Canadian Copyright Licensing Agency*¹⁷ it was held that use of course packs by students falls within the definition of 'private study or research'. Further, 'private' does not mean studying in isolation, but includes the classroom as well. In *Cambridge University Press v. Becker*¹⁸ it was held that making of course packs without permission of the owners is permitted subject to a fair use threshold of 10%. Rather than allowing a copyrighted work to be unused due to non-affordability or non-availability, it is better is to allow the educators, students and researchers to deal with such works fairly by not substantially affecting the interest of the copyright owners. With this aim, countries like United States and many other jurisdictions had formulated guidelines pertaining to photocopying for educational purposes.

4. DU PHOTOCOPY CASE

The litigation in the Delhi High Court between a group of leading international publishers and a small photocopy shop named Rameswari Photocopy Service has attracted massive public debate regarding the photocopying of copyrighted works for educational purpose. Though it is a well settled principle that such use amounts to fair dealing, the question arose was the extent to which a copyrighted work can be photocopied. The dispute arose in August 2012 when the publishers realized that Rameswari Photocopy Service attached to Delhi University by photocopy, reproduction and distribution of their publications on a large scale and circulating the same and by sale of unauthorised compilations of substantial extracts from

¹² *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151

¹³ *Basic Books, Inc. v. Kinko's Graphic Corp.*, 758 F. Supp. 1522.

¹⁴ *Williams & Wilkins Co v United States* 487 F.2d 1345 (Ct. Cl. 1973)

¹⁵ *Sony Corp. v Universal City Studios* 464 U.S. 417, 104 S. Ct. 774 (1984)

¹⁶ *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)

¹⁷ *Alberta (Education) v. Canadian Copyright Licensing Agency*, 2012 SCC 37, [2012] 2 S.C.R. 345

¹⁸ *Cambridge University Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012)

the plaintiffs' publications by compiling them into 'course packs'¹⁹ for sale, infringes their copyrights. Publishing houses Oxford & Cambridge University Press along with Press of Cambridge University, Taylor & Francis Group sued the photocopying shop along with Delhi University and asked for permanent injunction of the practice and recompense them monetarily. The plaintiff had stated that at least 4 course packs were sold containing photocopies of their publication varying from 6 to 65 pages. It was also stated the course packs were based on the syllabus issued by the university and that photocopying and circulating of such course packs were on recommendation of Delhi University. The defence was taken on the grounds of 'fair dealing' and was stated that the purpose of photocopying is to make it easy for the students to study as the syllabus prescribed reading materials of various authors and which excerpts of material is contained in different books of different publishers sold at a high price, often beyond the reach of the students. The main issue considered by the court was whether such photocopying of copyrighted material affects the interest of the publishers or the author over a larger interest. The court also considered the issue of affect on larger public interest guaranteed by the constitution of the country i.e. fundamental right to education for all. The court considered the right to education as the copyright law also seeks to achieve. Considering the submissions of both sides, Indian Law, precedents and foreign judgements, Justice Rajiv Sahai Endlaw of the High Court of Delhi in September 2016 held that the making of course packs for the purpose of education was well within the bounds of the law and did not amount to copyright infringement. The judge opined that Section 52(1)(i) of the Copyright Act which exempted copying for the purpose of educational instruction, was wide enough to cover the acts of the defendants. Ultimately, the court considered the act of Rameswari Photocopy Service as an act falling within the ambit of 'fair dealing' and dismissed the suit. But the battle did not end there. It continued when the publishers filed their appeal in October 2016 against the order of dismissal. Later, the Indian Reprographic Rights Organisation (IRRO) and two publishers' associations, namely, the Association of Publishers in India (API) and the Federation of Indian Publishers (FIP) have intervened in the appeal and the application to intervene was allowed. In December, 2016, the Division Bench comprising of Justices Pradeep Nandrajog and Yogesh Khanna decided the appeal interpreting Section 52(1)(i) of the Copyright Act as permitting photocopying of copyrighted works for preparation of course packs, irrespective of the quantity, as long as it for the purpose of educational instruction. The division bench also remanded certain issues to the single bench. It an order firmly refusing the applications filed by two publishers' associations (API and FIP) and IRRO for impleadment and intervention in the suit respectively. In April 2017, the IRRO filed a Special Leave Petition before the Supreme Court challenging the judgment passed by the Division Bench of the Delhi High Court in December 2016. In May 2017, A Supreme Court Bench consisting of Justices Ranjan Gogoi and Navin Sinha refused to admit the IRRO appeal stating that it is not maintainable. Finally, it stands high that photocopying of copyrighted works for educational purposes will not amount to infringement of copyrights.

¹⁹ compilation of photocopies of the relevant portions from different books prescribed in the syllabus, and their distribution to the students by educational institutions

5. ANALYSIS OF THE CASE

Analysis of the facts and decision of the case need to be made from two perspectives. One is from the perspective of the copyright owners whose rights guaranteed under the law will be violated and other is from the perspective of the students who will benefit from getting access to costly academic materials. The publishers and authors of books claim that they are not charity houses and philanthropists respectively and they question why they should give away their hard work without getting any benefits in return. The law provides for certain rights to the copyright owners in relation to their works. The law provides also for the exception and limitation to such rights. Copyright law in India and countries across the world recognizes using/reproducing/distributing parts of a copyrightable work, without making payments to the copyright holder, is necessary and permissible which is the essence of 'fair dealing'.

The factors considered in this case for determining the rights of the copyright owners and rights of end-users are the legality of the act of photocopying copyrighted works and the extent to which photocopying can be permitted. Legality of photocopying is determined on the basis of the purpose for which photocopying was done. As held in *Alberta (Education) v. Canadian Copyright Licensing Agency*,²⁰ if the purpose is to make use of photocopied copyrighted materials for classroom teaching, then it falls under the purview of 'fair dealing'. In DU photocopy case, as long as the photocopied copyrighted materials are used only by the students and teachers of the University, it does not tend to infringe the rights of the copyright owners. For the act of photocopying to fall under 'fair dealing', the defendants should not use the photocopied copyrighted materials anywhere outside the University. On dealing with the question of extent of permissible copying, the decision of *Cambridge University Press v. Becker*²¹ can be considered wherein it was held that copying is permissible up to 10% of the total page count of a book. According to the opinion of Mr. Shamnad Basheer, in India the threshold can be 20% as it is not an IP-maximalist country like US.²² But to stick by law, consideration can be given to the judicial decision. From the analysis of the empirical data²³ as to the use of copyrighted materials in the course packs made by the defendants, it is clear that the copying is approximately up to 8.81%. Ultimately, on the basis of Sec.52 of Indian copyrights Act providing for reproduction in the course of instruction and allowing fair dealing; laws of different countries as to making of course packs; compliance by the photocopiers to the laws and permitted threshold, the decision of the Delhi High Court Stands good.

6. FUTURE OF PHOTOCOPYING COPYRIGHTED WORKS

While countries like UK, Canada & USA either has a well framed system of law or the courts intervene in allowing photocopying for protecting the interests of the public at large. Considering the status of India, even though the Court had come up with guidelines in the

²⁰ Supra 19

²¹ Supra 20

²² Available at: <http://archive.indianexpress.com/news/publishers-vs-students/994981/0>

²³ Available at:

https://docs.google.com/spreadsheets/d/1QpG6g3nKlnmBMUs5073_EflywLcb6WSfy5TiuTX8KOA/edit#gid=0

present DU Photocopy case, the best course of action would be to amend the law on the basis of cues from the other major democracy of the world. The main inclusion in the laws could be emphasising use of copyrighted works for educational purposes and setting the extent of copying. Even though the Delhi Court refused the role IRRO in the case, they also can actually play a role in the future of photocopying of copyrighted works. In order to ensure access to affordable education, use of copyrighted works by reproducing it cannot be within the limits of the threshold. Just in the name of access to education, the rights of copyright owners should not be completely denied. Role of RROs is necessary to balance right to education and rights of copyright owners. They can be vested with the power to grant license to reproduce copyrighted works and to collect remuneration from the users. It could be made mandatory that in instances of copying or reproducing a copyrighted material exceeding the fixed threshold, the users should obtain license from RROs.

7. CONCLUSION

It had become radically easier to make copies of printed material since the introduction of the photocopier in 1954. This invention had alarmed Copyright owners as it facilitated easy copying and reproduction of any materials in paper. There were instances of unauthorized copying of copyrighted works. Unauthorized use fell within the scope of infringement of copyrights and the law has prescribed penalties for such acts. At the same time, copyrighted works were copied and reproduced for purposes within the ambit of 'fair dealing', under copyright law. The lacuna in the law is that it fails to include the extent of copying and reproduction for the fair purposes. The DU photocopy case sets out guidelines as to fixing the extent to which copying and reproduction of copyrighted materials can be allowed. The paramount necessity in the current scenario is to bring amendment in the laws as to extent of permissible copying.

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