

The Interface between Right to Education and Copyright Law

Does Copyright Law Inhibit the Enjoyment of Right to Education?

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Abstract

The Right to Education, recognized as a basic human right in international and domestic legal regimes and instruments alike, has not seen its realization to the fullest extent, in both developed and developing countries. One of the reasons, inter alia, is the high cost of educational materials owing to existing copyright practices and policies of the publishing industry, most of which are concentrated in developed countries of USA and Europe. The paper seeks to explore the extent to which copyright law impedes the fulfillment of the right to education, and discuss the alternatives that seek to balance these conflicting rights.

The paper is divided into three parts: the first part of the paper discusses the embodiment of the right to education in several national and instruments, the extent of problem of the lack of access to educational materials due to copyright protection. The next part of the paper discusses the flexibilities provided in international copyright law and efficacy of the same, primarily the doctrine of fair use. The last part of the paper discusses alternatives to fair use and impact of these supplementary mechanisms.

Keywords: Access to education, copyright law, fair use, open access, right to education

1. INTRODUCTION

The First Copyright Statute, the Statute of Anne of 1709¹, was entitled “An Act for the Encouragement of Learning”. Thus, the copyright law was founded on the belief that it shall promote the progress and dissemination of ideas and information.² Similarly, the U.S. Constitution empowers the Congress to “promote the progress of Science” (or in modern parlance,

¹ Copyright Act, 1709, 1710, 8 Ann., c. 19 (Eng.).

² Laurence R. Helfer and Graeme W. Austin (2011), HUMAN RIGHTS AND INTELLECTUAL PROPERTY [Online], Cambridge: Cambridge University Press., Available from: Cambridge Books Online, available at: <http://dx.doi.org/10.1017/CBO9780511976032>, (last visited: 22 May 2015).

“knowledge”³. By virtue of this power bestowed upon the Congress, the Congress devised a national copyright system for according protection to scientific and creative works.

Copyright seeks to protect “original and creative works” and this includes literary, artistic, which was later extended to musical and cinematographic works. With the invention of the printing press, copyright protection came about to incentivize authors and publishers to derive commercial or financial benefit from their “creations”⁴. In light of the underlying principle of copyright law embodied in the Statute of Anne (1709) to incentivize authors, copyright protection has been extended to educational materials as well.⁵ Copyright law is based on the idea that the flourishing of the private markets in copyright-protected works will promote learning.⁶ On the other hand, the human right to education imposes an obligation on the States and their governments to provide free education for all, and this, in turn, means the easy and cheap access to educational and learning materials.⁷

During the nineteenth century, the state’s role expanded to participate in providing education in the public sphere with the rise of the concept of welfare state, and its accompanying obligations.⁸ The provision of learning materials is an integral part of the human right to education. Copyrights affects the prices at which textbooks, and learning materials are provided, and therefore, tensions may arise between the right to education and the monopoly private right of the author owning the copyright.⁹ With the rise of socialist conceptions of the welfare state and its accompanying obligations, specific government responsibilities to provide education in the public sphere developed.¹⁰ Therefore, along with the right to work and the right to social security, the right

³ Article 1, Section 8, Clause 7: “The Congress shall have the power... To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”.

⁴ The British Statute of Anne (1710) alluded to individual rights of the artist. It began, “Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of printing... Books, and other Writings, without the Consent of the Authors... to their very great Detriment, and too often to the Ruin of them and their Families:” A right to benefit financially from the work is articulated, and court rulings and legislation have recognized a right to control the work, such as ensuring that the integrity of it is preserved. An irrevocable right to be recognized as the work’s creator appears in some countries’ copyright laws.

⁵ *Supra* Note 2.

⁶ *Id.*

⁷ *Id.*

⁸ Manfred Nowak, *The Right to Education* in ASBORN EIDE ET. AL (Eds.), *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 189, 191 (1995); *Supra* Note 2.

⁹ *Id.*

¹⁰ *Supra* Note 8.

to education featured prominently in the socialist constitutions and the socialist theories of human rights.¹¹

This led to a radical transformation in worldview regarding the scope of the role of the state and its human right obligations, and thus, emphasis shifted on commitment to a universal right to education that is set forth in modern international human rights instruments.¹² This, in turn, required a reconsideration of the relationship between education and intellectual property.¹³

2. RIGHT TO EDUCATION: EMBODIMENT IN DIFFERENT LEGAL REGIMES

Internationally, several instruments recognize the right to education as an “inherent right” to secure the “dignity” of all the people, and thus, right to education stems from human rights.¹⁴ As embodied in Article 26 of Universal Declaration of Human Rights (UDHR), the Preamble of which emphasizes on the “the inherent dignity and of the equal and inalienable rights of all the members of the human family...” A more direct connection between human dignity and the right to education is made in Article 13(1) of the International Convention of Economic, Social and Cultural Rights (ICESCR), which states that “that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.”

Education also furthers other human rights values. In its *General Comment No. 13*, the Committee on Economic, Social and Cultural Rights characterized education as the “primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty.”¹⁵ Education is also closely tied to public health and individual survival; as is widely acknowledged, a strong positive relationship exists between education and health outcomes, whether

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Yoram Rabin, *The Many Faces of the Right to Education*, in Daphne Barak-Erez & Aeyal M. Gross (Eds.), *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* 265, 266 (2007).

¹⁵ Comm. On Econ., Soc. & Cultural Rights, General Comment No. 13: The Right to Education, para. 1, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [General Comment No. 13].

measured by death rates (mortality), illness (morbidity), health behaviors, or health knowledge.¹⁶ Basic literacy and numeracy can provide a means for an individual to secure employment and, thereby, to satisfy other needs such as food and shelter.¹⁷ Education is also critical to development programs, and to the realization of sustainable development.¹⁸ As Ruth Okediji observes, “A well-informed, educated, and skilled citizenry is indispensable to the development process.”¹⁹

Education is also connected to the idea of self-realization.²⁰ Article 26(2) of the UDHR, for example, states that “education shall be directed to the full development of the human personality”. The Universal Convention on the Rights of the Child (UNCROC) refers to education in the context of “the development of the child’s personality, talents and mental and physical abilities to their fullest potential.”²¹ The Committee on Economic, Social and Cultural Rights has also emphasized that “education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of the human existence.”²²

The right to education is also characterized as an empowerment right, as even basic education empowers the citizens to participate more effectively in political systems of any state. Thus, right to education is consistent with the civil and political rights.²³ For example, education

¹⁶ Many studies affirm the close connection between education and health. See, e.g., Institute of Public Health in Ireland, *Health Impacts of Education: A Review* 7–8 (2008), available at <http://www.publichealth.ie/files/Health%20Impacts%20of%20Education.pdf> (noting sources). The World Bank’s 2007 annual report noted: “In all developing countries, but especially in the low-income regions of South Asia and Sub-Saharan Africa, immunization rates are higher among families whose mothers have some secondary education.” World Bank, *World Development Report 2007: Development and the Next Generation* 5 [World Development Report 2007], available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/09/13/000112742_20060913111024/Rendered/PDF/359990WDR0complete.pdf (last visited: May 22, 2015).

¹⁷ KLAUS DIETER BEITER, *THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW* 19 (2006).

¹⁸ Johannesburg Plan of Implementation, in *World Summit on Sustainable Development*, Johannesburg, S. Afr., Aug. 26–Sept. 4, 2002, *Report of the World Summit on Sustainable Development*, UN Doc. A/CONF.199/20.

¹⁹ Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries* (International Centre for Trade and Sustainable Development 2006), available at http://www.unctad.org/en/docs/iteipc200610_en.pdf. (last visited: May 22, 2015).

²⁰ *Supra* Note 2.

²¹ UNCROC art. 29(1) (a).

²² *Supra* Note 17.

²³ In *General Comment No. 11*, the U.N. Committee on Economic, Social and Cultural Rights noted: “[The right to education] has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights.” Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 11: Plans of Action for Primary Education (Article 14)*, para. 2, U.N. Doc. E/C.12/1999/4 (May 10, 1999) [General Comment No. 11]; see also, Katrina Tomaševski, *Removing Obstacles in the Way of the Right to Education: Right to Education Primers No. 1*, 5. (undated) [Tomaševski, *Primers No. 1*].

provides the citizens with the tools to question and challenge government orthodoxy.²⁴ Education enables the citizens to gain better understanding of the of the political questions at issue, thus makes basic democratic commitments, like the right to vote more meaningful, as educated citizens are able to make more informed decisions in electing the right candidate to be their political leader.²⁵

The U.S. Supreme Court decisions reflects several of the ideals sought to be achieved with the conferring of the right to education to citizens of a state, as embodied in many international instruments elucidated above. In *Brown v. Board of Education*²⁶, the Court characterized education as the “most important function of the local and state governments”, the “very foundation of good citizenship” and the “principal instrument in awakening the child to cultural values...”²⁷

The Hon'ble Supreme Court of India has expanded the right to education in the right to life as manifested under Article 21²⁸ of the Indian Constitution.²⁹ In India, the right to education was conferred with the status of Fundamental Right under Part III of the Constitution in 2002.³⁰ The Constitution (Eighty-sixth) Amendment Act, inserted Article 21A which made education a Fundamental Right for Children in the age-group of 6-14 years, by providing that:

*“The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.”*³¹

This Act, enforceable from 1st April 2010, makes it obligatory for the appropriate governments to ensure that every child gets free elementary education.³² In addition, the Act mandates that even private educational institutions have to reserve 25 per cent seats for children from weaker sections.³³ The Act says no school can deny admission to a student and all schools need

²⁴*Id.*

²⁵*Id.*, *Supra* Note 20.

²⁶ 347 U.S. 483 (1954).

²⁷*Id.*

²⁸ Article 21 provides: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

²⁹*Bandhua Mukti Morcha v. Union of India*, (1984) 2 S.C.R 67 (Bhagwati J); see also *Unni Krishnan, J.P. v. State of Andhra Pradesh*, (1993) 1 SC.R. 594. Broadly interpreting this constitutional guarantee, the court has developed the concept of a right to live with human dignity, which must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities of children to develop in a healthy manner and in conditions of freedom and dignity, *educational facilities*, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity.

³⁰ *Right to Education*, available at: <http://mhrd.gov.in/rte> (last visited: May 23, 2015).

³¹*Id.*

³²*Id.*

³³ *Id.*

to have trained teachers.³⁴ In case of schools not having trained teachers, they will have to comply with the provision within three years.³⁵ As per the new law, the schools need to have certain minimum facilities like adequate teachers, playground and infrastructure.³⁶ The government will evolve some mechanism to help marginalized schools comply with the provisions of the Act.³⁷ The government has already prepared model rules which have been circulated to the states for preparing their own rules for implementation of the Act.³⁸ The Centre has also prepared separate rules for the Union Territories which will be notified by the Law Ministry next week.³⁹

Moreover, the Act mandates that the state governments and local authorities to establish primary schools within walking distance of one km of the neighbourhood.⁴⁰ In case of children for Class VI to VIII, the school should be within a walking distance of three km of the neighbourhood.⁴¹ As per the government's estimate, there will be a requirement of Rs 1.71 lakh crore in the next five years for implementation of the Act.⁴²

3. COPYRIGHT IN TEXTBOOKS AND LEARNING MATERIALS: LAW OF COPYRIGHT V/S RIGHT TO EDUCATION

The critical problem of potential conflicts arises from the fact that the educational materials, in which authors may have a material interest, are critical to the realization of the right to education.⁴³

The price of textbooks is influenced by a number of factors, which is relative to the per-capita income of the country.⁴⁴ For example, textbooks are typically distributed to the students "for free" in the United States, which is one of the most developed countries, as a part of the system on public education.⁴⁵ In contrast, in a vast majority of the developing countries, the State does not

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Supra* Note 2.

⁴⁴ Margaret Chon, *Intellectual Property "from Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007).

⁴⁵ See Sharon E. Foster, *The Conflict between the Human Right to Education and Copyright*, in Paul Torremans (Ed.), *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* 287, 288 (2008); *Id.*

provide textbooks, and students must purchase them out of their own expenses.⁴⁶ In case of state owned or assisted publishing, these reasons include inefficient manufacturing methods, state monopolies, and favoritism.⁴⁷ In case of market-based textbook publishing, these reasons may include industry consolidation and lack of competition.⁴⁸ Higher prices may also be caused by the failure of multinational publishers to engage in differential pricing, so that a student in a developing country may pay a relatively high price for a book as a percentage of per capita GDP compared to a student in a developed country.⁴⁹

Many developing countries are also dominated by major international languages, and this dominance puts further strain on limited publishing and other resources.⁵⁰ This also makes these countries dependent on the nations which publish in major international languages.⁵¹ Moreover, the existence of minority languages within developing countries requires either *de novo* content creation or translation of existing materials that adds to the cost of textbook development.⁵²

Reliance on trade books⁵³ rather than textbooks does not solve the pricing or access issues.⁵⁴ A literature-based approach to basic education is costly compared to a textbook-based approach. This is due to lack of capacity and infrastructure to publish supplementary books, the expense of teacher training, and language difficulties including the challenge of multilingual nations.⁵⁵ However, limited book supply is “the biggest obstacle to literacy using non-textbook reading materials alone”.⁵⁶

A combination of all these factors has led to severe access problems with respect to basic educational materials protected by copyright.

The Provision of Learning Materials and the Human Right to Education

⁴⁶*Id.* at 824; See Stephen P. Heyneman, *The Role of Textbooks in a Modern System of Education: Towards High Quality Education for All*, in Cecilia Braslavsky (Ed.), TEXTBOOKS AND QUALITY LEARNING FOR ALL: SOME LESSONS LEARNED FROM INTERNATIONAL EXPERIENCES (2006).

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰ Philip G. Altbach, *Copyright in the Developing World*, IN JOSEPH P. FARRELL & STEPHEN P. HEYNEMAN (EDS.), TEXTBOOKS IN THE DEVELOPING WORLD: ECONOMIC AND EDUCATIONAL CHOICE 3–5 (1989); *Supra* Note 2; *Supra* Note 45

⁵¹*Id.*

⁵² *Supra* Note 45.

⁵³ A book that is published for and sold to the general public

⁵⁴ *Supra* Note 52.

⁵⁵ *Supra* Note 50.

⁵⁶*Id.*

A 2009 study affiliated with UNESCO found that “in many cases, children and teachers lack access to basic learning materials...Over half of Grade 6 pupils in many countries, including Mozambique, Malawi, Uganda, Zambia, did not have a single book.”⁵⁷

In its concluding observations on member state reports, the Committee on Rights of the Child has often identified problems with the provision of education materials. Of Barbados, the Committee said in 1999 that it “remains concerned about practical implementation of the educational reforms and of policy to provide textbooks to all schoolchildren.”⁵⁸ In 2001, the Committee said of Dominican Republic: “The Committee welcomes the State party’s efforts in the field of education...but it remains concerned about children’s limited access to materials and textbooks.”⁵⁹ In the same year, the Committee expressed concern regarding “the limited availability of learning materials” in Georgia.⁶⁰ A drastic shortage of textbooks in India was noted in 2000⁶¹, and reiterated in 2004, when the Committee referred to “the insufficient number of trained teachers, schools, classrooms, and the lack of relevant learning material, which affect the quality of education.”⁶²

The Doctrine of Fair Use

Prevailing copyright practices and policies in the global publishing industry have fostered inequality rather than addressed the need to build domestic capacity in publishing or greater access to books published outside the small national market.⁶³ The result is shaping of copyright rules are appropriate to the needs of the developing countries. The principal international instrument that addresses these accommodations is the Appendix to the Berne Convention.⁶⁴ The Appendix facilitates “bulk access”⁶⁵ of certain types of copyrighted material, including educational materials, in

⁵⁷ EFA Global Monitoring Report, *Overcoming Inequality: Why Governance Matters* 13 (2009), available at <http://unesdoc.unesco.org/images/0017/001776/177683E.pdf>. (last visited: May 22, 2015).

⁵⁸ U.N. Comm. on the Rights of the Child, *Concluding Observations: Barbados*, § 27, U.N. Doc. CRC/C/15/Add.103 (Aug. 24, 1999).

⁵⁹ U.N. Comm. on the Rights of the Child, *Concluding Observations: Dominican Republic*, § 41, U.N. Doc. CRC/C/15/Add.150 (Feb. 21, 2001).

⁶⁰ U.N. Comm. on the Rights of the Child, *Concluding Observations: Georgia*, § 52, U.N. Doc. CRC/C/15/Add.124 (June 28, 2000).

⁶¹ U.N. Comm. on the Rights of the Child, *Concluding Observations: India*, § 56, U.N. Doc. CRC/C/15/Add.115 (Feb. 23, 2000).

⁶² U.N. Comm. on the Rights of the Child, *Concluding Observations: India*, § 64, U.N. Doc. CRC/C/15/Add.228 (Feb. 26, 2004).

⁶³ *Supra* Note 44.

⁶⁴ *Supra* Note 2.

⁶⁵ Access of multiple copies of a copyrighted work at affordable prices.

developing nations.⁶⁶ The Appendix allows nations to adopt a compulsory licensing scheme that limits copyright owners' control over reproduction and translation rights in these works.⁶⁷ Under the Appendix, a national of an eligible developing country, may apply for a compulsory license to translate or to reproduce covered works at a price that is reasonably related to that normally charged in the country for comparable works.⁶⁸ However, the circumstances in which may issue such licenses are quite confined and highly complex. Firstly, a translation license may be issued only after three years from the date of first publication of the work, and can be granted only for teaching, scholarship, and research purposes.⁶⁹

For a reproduction license, the waiting time is generally five years after publication of a particular edition of a copyright protected work and is granted only for "systemic instructional activities".⁷⁰ The Appendix also requires an applicant for a license to show that the copyright owner denied permission to reproduce or translate, and imposes record-keeping and reporting obligations on parties who have attempted to locate the owner of the copyright, in case the copyright owner cannot be located.⁷¹ The Appendix also gives a "grace period" beyond the waiting period to copyright owners, in which no compulsory license can be issued if, during this grace period, the work is distributed in the developing country at reasonable prices.⁷²

However, these provisions have been a "dismal failure owing to the unduly complex and burdensome requirements associated with its use."⁷³

Article 10 of the Convention states that countries of the Union are permitted to use the copyrighted work for teaching purposes, provided such utilization is compatible with "fair practice".⁷⁴

⁶⁶ *Supra* Note 62.

⁶⁷ 1971 Appendix to the Paris Act Revision of the Berne Convention [Berne Appendix]. The Universal Copyright Convention (UCC) includes broadly parallel accommodations. Universal Copyright Convention arts. V *bis*-V *quater*, Sept. 6, 1952, as revised at Paris on July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178; See SAM RICKETSON & JANE GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 123 (2006).

⁶⁸ *Id.* at 932.

⁶⁹ *Id.*

⁷⁰ *Id.* art. 2(5).

⁷¹ *Id.* art. 4(1)-(2).

⁷² *Id.* art. 3(2).

⁷³ *Supra* Note 65.

⁷⁴ *Supra* Note 44.

Moreover, Article 13 of TRIPS allows for exceptions or limitations to exclusive rights to “certain special cases which do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”⁷⁵ Consequently, copyright laws of TRIPS member states are designed to provide flexibilities that allow use of copyrighted works that does not result in infringement and allows use for specific purposes.

This is generally known as “fair use” (US), or “fair dealing” (India, UK).

In India, as in the UK, the concept of fair dealing has been adopted in the Copyright Act, 1957, instead of fair use of the USA.⁷⁶ One of purposes that are within the ambit of fair use is making copies of the copyrighted work for educational, research and teaching purposes. This exception further entails right to reproduce a literary, musical, or artistic work by the teacher or the pupil in the “course of instruction”⁷⁷. Fair Use or Fair Dealing is one of the most jurisprudentially ambiguous doctrines found in law, and has consequently seen the widest and varied interpretation from courts all around the world. Seemingly, interpretations of this legal doctrine have also been influenced by per-capita income of the country.⁷⁸

In Canada, educational institutions and persons acting under their authority may make copies and give performances of works for educational purposes, with restrictions where such works

⁷⁵ Agreement on Trade Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994, 1869 U.N.T.S. 299 [TRIPS Agreement].

⁷⁶ Dharam Veer Singh and Pankaj Kumar, *Photocopying of Copyrighted Works for Educational Purposes: Does it Constitute Fair Use* 10 JIPR 21-33 (2005).

⁷⁷ For Example: Section 52(1), Copyright Act, 1957 deals with fair use. This section has only two sub-sections, Section 52(1) (g), (h) dealing with fair use or fair dealing in educational context. Section 52(1) (g) states: 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. Explanation.—In the case of a work of joint authorship, references in this clause to passage from works shall include references to passages from works by any one or more of the authors of those passages or by any one or more of those authors in collaboration with any other person; Section 52(1) (h) states: (h) 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;

(i) the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and student of the institution, or of a cinematograph film or a [sound recording], if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution, or the communication to such an audience of a cinematograph film or sound recording];

[(j) the making of sound recordings in respect of any literary, dramatic or musical work,

⁷⁸ It has generally been observed that decisions have been in favour of publishers in more developed countries like USA, instead of end users of the copied work.

are commercially available. This is not an infringement of copyright to publish in a collection, mainly composed of non-copyrighted matter, intended for use in schools, if not more than two passages from works by the same author are published by the same publisher within five years, and the source from which the passages are taken is acknowledged.⁷⁹

In the USA, the fair use doctrine allows a person to use copyrighted material in a reasonable manner without the copyright owner's consent and irrespective of the monopoly granted to the owner.⁸⁰

While statutes in many copyright laws of the world allow copying or reproduction of copyrighted works for educational, research and training purposes, limited to classroom instruction, and benefit of the students, courts have given strict interpretation to the scope and ambit of the term "educational purposes".

The Indian DU Copyright case epitomizes this conflict between statutory language for fair use under copyright laws, and the interpretation of "fair use for educational purposes" by the leading courts of the country. In this case, a consortium of publishers, which included the likes of Oxford University Press, and other publishing giants such as Cambridge University Press (CUP) and Taylor and Francis, for alleged copyright infringement against Delhi University and Rameshwari Photocopy Service.⁸¹ On 14 August, 2012, the Delhi High Court issued an order appointing a local commissioner to visit, without any prior notice, the premises of Rameshwari Photocopying Service.⁸² Under this search and seizure order, permitted under Section 64 of the Copyright Act, 1957, an inventory of all the infringing or pirated copies was made to be seized and handed over to the defendants only on the basis of a surety.⁸³ The allegedly infringing materials were course packs containing extracts from different books that are selected by the relevant faculty teaching the course at Delhi University, which students routinely procure from Rameshwari Photocopy Service.⁸⁴ It is common knowledge that in most academic disciplines, textbooks are extremely expensive and

⁷⁹ Section 32.2 (1) (e), Copyright Act.

⁸⁰ Section 107 of the Copyright Act provides for limitations imposed on the exclusive rights of copyright owners by fair use. This section states that the fair use of copyrighted work, including such use by reproduction in copies...for purposes such as...teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

⁸¹ *Delhi University, Photocopy Service In The Dock Over Piracy*, available at: <http://www.thehindu.com/news/cities/Delhi/article3815275.ece> (last visited: May 15, 2015).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

affordable for the average student, and if one attempted to buy all the books which are prescribed for a course, it would mean only a few privileged students would afford an education in India.⁸⁵

In the United States, the first infringement litigation against photocopying for educational uses arose in 1980-81. In 1980-81, publishers brought copyright actions against two for-profits shops that were copying materials for student use.⁸⁶The parties settled both the cases, and the settlement included an agreement that the shops would adhere to the Classroom guidelines as a limit on fair use.

However, in a major court decision, course packs were held to be illegal and amount to copyright infringement, as evident from the 1991 case of *Basic Books Inc. v. Kinko Graphics Corp.*⁸⁷The plaintiffs in this case, all major publishing houses, alleged that Kinko's infringed their copyrights when they copied excerpts from books, whose rights were held by the plaintiffs, without permission and without payment of required fees and sold the copies for a profit. The Court found that Kinko's did not convincingly show that the excerpts it appropriated without seeking permission were a fair use of the works in question and concluded that they violated the Copyright Act.⁸⁸ The Court granted the plaintiffs injunctive relief, as well as statutory damages in the amount of \$510,000, attorney's fees and costs. The Court further held that plaintiffs did not misuse their copyrights nor are they estopped from asserting their rights under copyright law.⁸⁹

In the case of *Princeton University Press v. Michigan Document Services (MDS) Inc.*⁹⁰, this case further demonstrates the lack of resolution on common fair use issues, and the case reveals the struggle even among federal judges over the meaning of fair use in general.⁹¹ In this case, a private

⁸⁵ Danish Sheikh, *Fair Use and Course Packs: A Comparative Perspective*, available at: <http://kafila.org/2012/08/27/fair-use-and-course-packs-a-comparative-perspective-danish-sheikh/> (last visited: May 15, 2015); See Shammad Basheer, *A Fair Education in a Copyright World?*, available at: <http://spicyip.com/2012/09/a-fair-education-in-copyright-world.html>, (last visited: 29 May 29, 2015) See: Lawrence Liang, *Oxford and Cambridge University: Publishers v. Students of India*, available at: <http://kafila.org/2012/08/27/oxford-and-cambridge-university-publishers-v-students-of-india> (last visited: May 15, 2015).

⁸⁶ *Association of American Publishers v. New York University*, 759 F. Supp. 1234.

⁸⁷ 758 F. Supp. 1522.

⁸⁸ *Basic Books, Inc. v. Kinko's Graphics Corp.*, available at: <http://fairuse.stanford.edu/case/basic-books-inc-v-kinkos-graphics-corp/> (last visited: May 15, 2015).

⁸⁹ *Basic Books, Inc. v. Kinko's Graphics Co.*, available at: http://www.bc.edu/bc_org/avp/cas/comm/free_speech/basicbooks.html (last visited: May 15, 2015).

⁹⁰ *Princeton University Press v. Michigan Document Services Inc.*, 99 F.3d 1381 (6th Cir. 1996).

⁹¹ Dharam Veer Singh and Pankaj Kumar, *Photocopying of Copyrighted Works for Educational Purposes: Does it Constitute Fair Use* 10 JIPR 21-33 (2005).

shop created and sold course packs under circumstances similar to Kinko's and the copy shop was found to have acted outside the limits of fair use.⁹²

In *American Geophysical Union v. Texaco Inc.*⁹³, Chickering, an employee of Texaco, engaged in conducting scientific research to improve commercial performance of petroleum products, placed six photocopied articles from the *Journal of Catalysis* in his files for future reference, as he believed that the material and data found within these articles would facilitate his current professional research.⁹⁴ The issue was whether the photocopying of individual articles by Chickering for his own research was fair use. The Court held that photocopying of individual general articles by a Texaco scientist for his research needs was not fair use.⁹⁵

In *Marcus v. Rowley*⁹⁶, the plaintiff wrote a 35-page booklet on cake decorating and used it to teach adult education classes. Rowley, the defendant, enrolled in one of Marcus' classes, purchased a copy of the booklet, and used it to develop her own booklet for her own classes, and eleven of twenty-four pages in her work were copied directly from Marcus' original work. Rowley neither gave the plaintiff credit for her work nor acknowledged her copyright. The Ninth Circuit rightly ruled that Rowley's use was not fair use. This was a clear-cut case of use of copyrighted work for commercial purpose, as the students who enrolled in her classes paid fees, and Rowley was able to make profits from copying Marcus' original work.

However, in more recent case with striking similarities with the DU Photocopy case, a case was filed against Georgia State University against Cambridge University Press, Oxford University Press and Sage Publications⁹⁷. The defendants, were indulging in digital dissemination of these course packs through two on-campus systems as maintained by them: E-Res (E-Reserves) and U-Learn. Both these systems allowed students to obtain a digital copy of the designated course material, as against paper course packs like in the DU case. The issue was whether the defendant was required to take licenses or "permissions" to post an excerpt of the plaintiffs work at E-Res or U-Learn. The District Court applied fair use⁹⁸ analysis on each individual claim of copyright

⁹² *Supra* Note 69.

⁹³ *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2nd Cir. 1994).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Marcus v. Rowley*, 695 F.2d 1171.

⁹⁷ *Cambridge University Press et al. v. Patton et al.*, 769 F.3d 1232 (11th Cir. Ga. 2014).

⁹⁸ The "Fair Use" "Four Factor Test as laid down in 17 U.S.C. §107, seeks to examine whether the alleged infringement is permissible under the "fair use" defense or not:

1. The purpose and character of the use,

infringement. Thus, the Court ruled in favor of the Defendants in five out of seventy-four claims of copyright infringement. On appeal to the 11TH Court of Appeals, however, the Court held that District Court did not apply the fair use test correctly, and the legally flawed methodology adopted by the Court, and thus, the Court reversed the decision of the district court.

The Court of Appeals held that the four factors for fair use need to be applied on a case-to-case basis as a whole, and one or more factors may be given less weightage than the other factors. The decision of the Court of Appeals was a blow to the University and the students. The Delhi High Court also adopted a similar approach in the Delhi Photocopy case.⁹⁹ In this case, the defendant was engaged in the business of selling course packs to the students of Delhi University, which contained excerpts from textbooks for humanities subjects, of which the plaintiff had copyright.¹⁰⁰ These course packs were prescribed by the faculty of Delhi University for the students.¹⁰¹ Publishing Houses like Oxford and Cambridge University along with the Press of Cambridge University sued the photocopying shop along with Delhi University and sought permanent injunction to restrain the plaintiffs from selling the course packs and compensation for the loss of sales due to the alleged infringement of the copyright of the plaintiff.¹⁰² The Delhi High Court ruled in favour of the publishers, and granted an interim injunction to restrain the defendants from selling the course packs. The Judgment, however, fails to provide expound reasons for the grant of injunction under the provisions of the copyright law.

Under Indian copyright law¹⁰³, reproduction of a copyrighted work by a teacher or a pupil is permitted if so done for the course of instruction. Therefore, the creation and selling of course packs, containing excerpts of academic textbooks, prescribed by the teachers of the University themselves, is well-within the domain of "fair use" under the tenets of Indian law.¹⁰⁴ The fact that the

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2. The nature of the copyrighted work,
 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
 4. The effect of the use upon the potential market of the copyrighted work.

See Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

⁹⁹ *The Chancellor, Masters & Scholars of University of Oxford & Ors v. Rameshwari Photocopy Services & Anr.*, I.A. No. 14632/2012 in CS (OS) No. 2439/ 2012.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Section 52 (1)(i), Indian Copyright Act, 1957.

¹⁰⁴ Lawrence Liang, *Oxford and Cambridge University Publishers v. Students of India*, available at: <http://kafila.org/2012/08/27/oxford-and-cambridge-university-publishers-v-students-of-india/> (last visited May 22, 2015).

Copyright Act in India does not lay down any quantitative restrictions when it comes to personal use or educational use even though such restrictions operate for other kinds of usages is indicative of the intention of the policy makers to ensure that there is adequate access to learning materials.¹⁰⁵The Delhi Photocopy case epitomizes the debate between the right of the publishers to be recompensed for their intellectual and creative output, on the one hand, and the rights of the students, including those from impoverished sections of the society, for whom full and functional enjoyment of the right to education is beyond their reach without the cheap access to exorbitantly priced learning and educational material.¹⁰⁶

While reproduction, including in the form of photocopying, and using or distributing parts of a copyrightable work, without permission or making payments to the copyright holder, is permissible under Indian as well as international copyright instruments, also known as “fair dealing”, for determining whether distribution of extracts to students, constitutes “fair use”, a reference may be made to the Canadian case of *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*.¹⁰⁷In this case, the court ruled that copying material for teaching in classrooms would pass the permissible purpose test. One could arguably restrict the scope of this decision to ‘teaching in the classroom’ alone.¹⁰⁸ Arguably, the Canadian copyright law runs on similar lines with the Indian Copyright law.¹⁰⁹

The “fair dealing” exception may also be examined under the “four factor test” under U.S. Copyright law¹¹⁰:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

¹⁰⁵*Id.*, See Sec. 52(1) (a) allows for a fair dealing with any work (except computer programs) for the purposes of private or personal use, including research. It is therefore very much within the rights of the university and the students to create course packs and to access photocopies of academic texts and articles in the course of instruction.

¹⁰⁶Amlan Mohanty, *Analysing the Delhi University v. Publishers Photocopying Case*, available at: <http://spicyip.com/2012/09/analysing-delhi-university-v-publishers.html> (last visited: May 22, 2015).

¹⁰⁷ 2012 SCC 37; *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Section 29, Canadian Copyright Act.

¹¹⁰ 17 U.S.C. §107.

(4) The effect of the use upon the potential market for or value of the copyrighted work.

The actions of the photocopy shop do satisfy the first test: the purpose is clearly identifiable as the course packs have been made available for the study and research purposes of the students.¹¹¹ Thus, the use of the allegedly infringing work is vividly non-commercial. Under the second factor, there are two questions to be seen: is the copyrighted work original and creative or it is mostly factual in nature? As a general principle, facts and compilation of information is accorded less strong protection than purely creative works.¹¹² Thus, it needs to be seen whether the copyrighted textbooks were mostly factual or creative in nature.

Further, on the question of “extent of permissible copying”, in the case of *Cambridge University Press v. Becker*,¹¹³ it was decided that the University would not require a license for reproduction of less than 10% of the total page count of the book.

As Amlan Mohanty states¹¹⁴, in the table reproduced below, the average percentage of the entire book copied is only 8.81%, which meets the threshold level of *Becker*.

BOOK	Total pages in book	Pages copied	% of book copied	Publisher
COURSE PACK I				
Transforming India: Social and Political dynamics of Democracy	456	36	7.89	OUP
The BJP and Compulsions of Politics in India	402	26	6.46	OUP
Parties and Party Politics in India	584	33	0.05	OUP
Ethno-nationalism in India: A reader	576	36	6.25	OUP
Nehru and the Language Politics of India	280	27	9.64	OUP
The Political Economy of Federalism in India	432	14	3.24	OUP
Politics in India	618	19	3.07	OUP
The Production of Hindu-Muslim Violence in Contemporary India	500	21	4.2	OUP
The New Cambridge History of India (IV) The Politics of India since 1947	428	21	4.9	Cambridge
COURSE PACK II				
The New Cambridge History of India III: 4 Ideologies of the Raj	256	32	12.5	Cambridge
Capitalism: A Very Short Introduction	160	48	30	Cambridge
Post-Colonialism: An Historical Introduction	512	57	11.1	OUP
A Concise History of India	372	16	4.3	Cambridge
Oxford Journals: The Past and Present Society	204	39	19.1	OUP
An Anthropologist among the Historians and other Essays	682	18	2.63	OUP
COURSE PACK III				
Issues in Political Theory	416	141	33.8	OUP
Practical Ethics	352	31	8.8	OUP
Political Philosophy	Not Available	Not Available	Not Available	Routledge/Taylor & Francis

¹¹¹ Amlan Mohanty, *Fair Dealing – Circulating Extracts to Students and Song Previews*, available at: <http://spicvip.com/2012/07/fair-dealing-circulating-extracts-to.html> (last visited: May 22, 2015).

¹¹² *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340 (1991).

¹¹³ 863. F.Supp.2d 1190 (N.D.Ga., 2012).

¹¹⁴ *Supra* Note 22.

With respect to the third factor, as already seen, the “amount” of pages copied as compared to the total number of textbooks was on average 8.1%. Thus, the third test is also satisfied. However, the Delhi High Court has failed to analyze “how many” pages have been copied from the entire books for creating the course packs.

As regards the fourth factor, how the course packs affected the sales of the textbooks needed to be analyzed. If the effect on the net sales of the textbooks was minimal or negligible, the fourth factor is also fulfilled.

The extent of fair use was also discussed in the celebrated Hathi Trust Case¹¹⁵. In a suit filed in 2011, Authors Guild sought to restrain Hathi Trust from digitalizing literary works for the purpose of creation of full-text database, to provide access to print disabled through creation of image files of the text, and general preservation of the texts.¹¹⁶ In June 2014, the Court of Appeals ruled in favour of Hathi Trust allowing Hathi Trust to digitalize the works on the grounds that it constituted fair use.¹¹⁷ Thus, the Court also considered public interest as a factor to determine “fair use”.

In summary, it may be said that the Court failed to consider the jurisprudential aspects of copyright law for delivering its judgment. The Court, unlike the Court of Appeals in the Hathi Trust Case, did not consider public interest aspects as well, for deciding whether the course packs are covered under the ambit of “fair use” or not.

4. HOW CAN LEARNING MATERIALS BE MADE MORE ACCESSIBLE?: OTHER ALTERNATIVES TO DOCTRINE OF FAIR USE

The Open Access System

Simply put, the Open Access System deals with free access to and reuse of scholarly works. So far, it's been primarily concerned with scholarly journal articles, digital books, electronic theses, and dissertations, and research data.¹¹⁸ Open Access (OA) accords users to read, copy, download, print and distribute, search or link to the complete textbooks, permitting use for any lawful purpose,

¹¹⁵ *Authors Guild, Inc. v. Hathi Trust*, 755 F.3d 87 (2d Cir. 2014).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Aniket Pandey, Apoorv Pandey, *Delhi University vs. Publishers: A Critical Appraisal on Doctrine of Fair Dealing Vis a Vis Fair Use*, available at <http://ijlljs.in/delhi-university-vs-publishers-aniket-pandey-b-b-a-ll-b-corporate-law-hons-5th-yr-university-of-petroleum-energy-studies-dehradun-and-apoorv-pandey-b-b-a-ll-b-hons-3rd-yr-itm-universi/> (last visited: May 22, 2015).

as long as internet access to the material is feasible.¹¹⁹ Open access isn't applicable to content that authors/publishers expect financial benefits and functions within current copyright law by permitting authors to either retain the right to post their papers on institutional servers or transfer rights to publishers who enable free access to their work.¹²⁰

Creative Commons

Creative Commons, is a nonprofit organization which enables the sharing and use of creativity and knowledge through free legal tools.¹²¹ The organization allows authors to give permission to make their works publicly accessible for use and share, by providing customized copyright licenses, which may be chosen by the authors themselves.¹²² CC licenses lets authors easily change their copyright terms from the default of "all rights reserved" to "some rights reserved."¹²³

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¹¹⁹*Id.*

¹²⁰*Id.*; Karen M. Albert, *Open access: Implications for Scholarly Publishing and Medical Libraries*, 94(3) J. MED. LIBR. ASSOC. 253, 253 – 54 (Jul. 2006)", available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1525322/pdf/i1536-5050-094-03-0253.pdf> (last visited May 1, 2015).

¹²¹*Creative Commons: About*, available at: <http://creativecommons.org/about> (last visited: May 22, 2015).

¹²²*Id.*

¹²³*Id.*

¹²⁴*Id.*

¹²⁵*About the Licenses: Our Licenses*, available at: <http://creativecommons.org/licenses/> (last visited: May 25, 2015).

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Number Crunching: Understanding the Impact of Creative Commons

From the figures obtained from Creative Commons website, many authors around the world are using Creative Commons (CC) licences from making their works more accessible worldwide.¹²⁶ Encouragingly, more authors themselves are opting for more liberal and open of the CC licenses than they did four years ago.¹²⁷ This demonstrates the attitude of the authors themselves to make their works more easily accessible and desire to reach millions of people through their creative contributions, rather than enjoying their monopoly copyright accorded to their works. Of all the

¹²⁶ According to Creative Commons, in 2014, there were over 882 million CC-Licensed works over the Internet, and more authors are opting for more liberal and open licences than they did four years ago: *State of the Commons: Number of Creative Licensed Works*, accessible at: https://stateof.creativecommons.org/?utm_campaign=2014fund&utm_source=carousel&utm_medium=web (last visited: 27 May 2015).

¹²⁷ *Id.*

CC-Licensed works, the highest number of the works is published in North America.¹²⁸ Further, around 9 million websites use CC Licenses.¹²⁹

Significantly, openly-accessible textbooks have saved students 100 million dollars.¹³⁰

Thus, one may conclude that open access movements such as Creative Commons have not only made textbooks and other kinds of reading materials more accessible through the medium internet, but also have saved students, and other users alike, truckloads of money, which they would otherwise have to shell out because of higher costs associated with copyrighted materials, while enabling authors to retain copyright over their creative works.

Realizing the impact open access movements, including Creative Commons, has had on sharing of educational and reading materials to the students, and other users of the world, UNESCO has launched Open Access Repository under Creative Commons, making more than 300 digital reports, books and articles available under Creative Commons Licenses.¹³¹ This clearly shows that open access policies that increase access and reduce costs to education, research, scientific and cultural resources have certainly grabbed the attention of international forum such as the United Nations (UN), and the days are not far behind when open access and policies are adopted by and committed to by most countries of the world.

Countries around the world, such as US¹³², UK¹³³, Argentina¹³⁴, Scotland, India¹³⁵, China¹³⁶, New Zealand¹³⁷, Australia¹³⁸, have adopted legislations or policies that lead to creation, increased use, or improvement of open educational resources by requiring an open license like CC BY¹³⁹.¹⁴⁰

¹²⁸ 37% of the CC Licensed works are published in North America. *Id.*

¹²⁹ *Id.*; for example: “Wikipedia” has 34 million articles, “Flickr” has 307 million photos, and “YouTube” with 10 million videos which have CC Licenses.

¹³⁰ *Id.*

¹³¹ Cable Green, *UNESCO Launches Open Access Repository Under Creative Commons* (December 18, 2013), available at: <https://creativecommons.org/weblog/entry/41265> (last visited: 27 May, 2015).

¹³² The Federal Research Public Access Act (FRPAA) is a proposal to require open public access to research funded by eleven U.S. federal government agencies. It was originally proposed by Senators John Cornyn and Joe Lieberman in 2006 and then again in 2010, and then once more in 2012; The Fair Copyright in Research Works Act, 2009, aims to amend Title 17 of the United States Code with respect to works associated with specific funding agreements.

¹³³ In June 2012, the report from the National Working Group on Expanding Access to Published Research Findings (the ‘Finch Group’) - *Accessibility, sustainability, excellence: how to expand access to research publications* was published. The report sets out an encouraging and challenging road map to improve open access to scholarly literature and the Research Councils have used the findings of the group to further develop the policies that they have had in place since 2005: “RCUK Policy on Open Access and Supporting Guidance”, available at: <http://www.rcuk.ac.uk/RCUK-prod/assets/documents/documents/RCUKOpenAccessPolicy.pdf> (last visited: 27 May, 2015).

5. CONCLUSION

One of the ways in which educational materials may be made more accessible if the Courts around the world sought more clarity on the extent and objective of fair use provisions. The success of movements like Creative Commons, is evidence that authors are willing to reach millions of readers. Such efforts should be encouraged with legislative implementation of open access provisions within domestic copyright laws. Governments should also commit themselves to make learning materials more accessible, particularly developing countries, where education is an important tool to alleviate socio-economic conditions of the country.

¹³⁴Maxmiliano Marzetti, *Argentina Passes Open Access Act for Publicly Funded Research*, available at: <http://www.ip-watch.org/2013/12/16/argentina-passes-open-access-act-making-publicly-funded-research-available/> (December 16, 2013) (last visited: 27 May, 2015).

¹³⁵Shubhra Priyadarshini, *India Unveils New Open Access Policy*, available at: <http://blogs.nature.com/indigenus/2014/12/india-unveils-new-open-access-policy.html> (December 26, 2014) (last visited: 27 May, 2015).

¹³⁶Richard Van Noorden, *Chinese Agencies Announce Open Access Policies*, available at: <http://www.nature.com/news/chinese-agencies-announce-open-access-policies-1.15255> (May 19, 2014) (last visited: May 27, 2015).

¹³⁷The New Zealand Government Open Access and Licensing framework (NZGOAL), approved by Cabinet on 5 July 2010, is government guidance for agencies to follow when releasing copyright works and non-copyright material for re-use by others (available at: <https://www.ict.govt.nz/guidance-and-resources/open-government/new-zealand-government-open-access-and-licensing-nzgoal-framework/>) (last visited: 27 May, 2015)

¹³⁸*Australian Government: Australian Research Council-Open Access Policy*, available at: http://www.arc.gov.au/pdf/Open_Access/ARC_Open_Access_Policy_Version_2015.1.pdf (last visited: 27 May, 2015).

¹³⁹CC BY: License of Attribution.

¹⁴⁰*Supra* Note 94.

