

# PHOTOCOPYING AND DOCTRINE OF FAIR DEALING: AN ANALYSIS

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## ABSTRACT

*Photocopying of text books, materials, course packs etc has become a substantial or rather inevitable part of any man's life in the technologically progressing world. Academicians, to be precise, generally photocopy either due to lack of books or due to exorbitant prices of the same. Major section of people in a developing country like India, who hail from diversified economic backgrounds, cannot be usually expected to splurge money on highly expensive volumes for carrying out their academic accomplishments. All those who are in dire need of information, but have no access to any hard copy of the material, usually tend to photocopy the required text or contents of the base material source for their subsequent academic usage. This is the point of threshold where the legal question arises regarding the infringement of copyright of publishers. The main question is whether the photocopying of books, materials, course packs etc for academic purposes amount to infringement of copyright or not. The answer to this may vary with facts and circumstances in each case. But in general, there is a common exception recognized by various countries i.e., "Fair Use".*

*The doctrine of fair use evolved in U.S. In Common law countries it is known as "Fair Dealing" and is similar to the U.S. doctrine of fair use. In India, fair dealing or fair use has been recognized and dealt under Section 52 of Copyright Act, 1957 which says 'Certain acts not to be infringement of copyright'. Section 52 (1) (b) says that there is no infringement if it is done by a teacher or a pupil in the course of instruction. The recent judgment of Delhi High Court which recognized this doctrine was hailed as historic one by the students, Indian publishers etc.*

*Therefore, this paper would deal with the analysis of the exception of fair use for educational or academic purposes. It would also explain the Indian position regarding the photocopying, whether it would amount to copyright infringement in light of the recent Delhi High Court judgment.*

*Keywords: Copyright, Education, Fair dealing, Fair use, Photocopying.*

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## 1. Introduction

Copyright contributes its significant share to the development of a country. The enrichment of the national cultural heritage depends directly on the level of protection afforded to literary, dramatic, musical and artistic works, cinematographic films and sound recordings. The higher the level, the greater the encouragement for authors to create and greater the number of a country's intellectual creations, the higher its renown. Encouragement of intellectual creation is recognized as one of the basic prerequisites of all social, economic and cultural developments.<sup>1</sup>

Copyright is the most vulnerable form of intellectual property, as it is utterly fragile and prone to abuse and theft. Generally, it is said that advancement of science and technology improves the standard of life in a society. However, in the case of copyright protection the advancement has posed greater challenges for protection of copyright, right from the invention of printing machine by Johannes Gutenberg of Mainz of Germany till date. With the advent of reprographic technologies like photocopying, etc., it has become more difficult to protect the copyright of the authors.<sup>2</sup> This is exactly where the tussle between original authors and human copiers springs up regarding the infringement of copyright. After a steady process of determination from time to time, has evolved a prominent and qualified defence of "Fair Use" where the users defend themselves in a copyright infringement suit.

This project shall deal with the issues pertaining to the fair use in academic purposes i.e., whether photocopying for academic purposes will be entitled for protection under fair use. The legal positions in various countries shall be dealt followed by an analysis of Indian scenario in the light of Delhi High Court judgment.

### 1.1 Meaning of Fair Use

Any unauthorized use of the copyright in a work amounts to infringement of copyright of the original work. However, some unauthorized uses of copyright work for certain specific reasons are

allowed by law, and it is not considered as an infringement of that work. The basis of law for this unauthorized use is the reproduction of some portion of the copyright work for purposes such as research, private study, criticism, news reporting, teaching, review etc. Such unauthorized use is termed as 'fair use' or 'fair dealing'. Thus fair use fair dealing is a doctrine that generously allows copying of a copyright protected work without deeming the copier an infringer, even though the copyright holder has not authorized copying.<sup>3</sup> The term fair use or fair dealing has nowhere been defined. The courts find it difficult to lay down precise standards. On the examination of case laws, an important test has evolved. The test is to find out whether the use is likely to harm the potential market or the value of the copyrighted work.<sup>4</sup>

## 2. Research Methodology

### 2.1 Problem

Photocopying of text books, materials, course packs etc has become a substantial or rather inevitable part of any man's life in the technologically progressing world. Academicians, to be precise, generally photocopy either due to lack of books or due to exorbitant prices of the same. Major section of people in a developing country like India, who hail from diversified economic backgrounds, cannot be usually expected to splurge money on highly expensive volumes for carrying out their academic accomplishments. All those who are in dire need of information, but have no access to any hard copy of the material, usually tend to photocopy the required text or contents of the base material source for their subsequent academic usage. This is the point of threshold where the legal question arises regarding the infringement of copyright of publishers. The main question is whether the photocopying of books, materials, course packs etc for academic purposes amount to infringement of copyright or not.

### 2.2 Rationale

The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. The rationale for exception of fair dealing in copyright law is that while the owner of any intellectual asset has absolute right over his asset like any other personal asset, he also has the responsibility to allow selective use of that asset for the benefit of the society. The reason for allowing the exception of fair dealing is that an infringing use of the copyrighted work may bring about greater public benefit than its denial. Thus, the exception ensures limited utilization of copyrighted resources for research, development and welfare of the masses. Fair dealing should be perceived as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.

### 2.3 Objectives

The main objectives of this research are:

- To analyse the defence of 'Fair Dealing'.
- To look into the position of defence of fair dealing in various countries.
- To study about the importance of copyright in promotion of education.
- To look into the position of defence of fair dealing in India.

### 2.4 Hypothesis

The hypothesis for this research is that India as a welfare state is slightly inclined towards a "Pro-User" regime in protection of copyrights. It gives incentives to the author under the Copyright Act, 1957, on the other hand protects the users under defence of fair dealing in view to promote education through dissemination of knowledge.

### 2.5 Nature and Type of the Study

This study is Doctrinal in nature. This Doctrinal research is descriptive and analytical in nature. Legal rules, statutes and cases are provided wherever necessary.

### 2.6 Sources and Types of Data

Primary and Secondary resources have been largely used to gather information and data about the topic. Books and other references have been primarily helpful in giving this dissertation a firm structure. Websites and articles have also been referred. Footnotes have been provided wherever needed to acknowledge the source. OSCOLA rules of footnoting have been followed throughout the paper.

### 2.7 Limitation of Study

The doctrine of fair dealing deals with vast number of exceptions to copyright infringement. This research has been limited to the study of concept of fair dealing for educational purposes.

## 3. International Scenario

### 3.1 TRIPS

Almost each and every country either under the obligations of Berne Convention, 1883 (Article 9 & 10) or under the obligations of TRIPS (Article 13) protect copyrights of authors and users subject to exceptions under their legislative competence. Article 13 of TRIPS deals with 'Limitations and Exceptions' and it says 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. Here shall be dealt, the position of fair use in various countries.

### 3.2 USA

Article 1, Section 8, Clause 8 of the United States Constitution empowers Congress “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.” With regard to original works of art or the intellect, Congress has attempted to fulfill its mandate by vesting in the creator of such a work an alienable property right, known as copyright.<sup>5</sup> S. 106 and S. 106-A of 17 U.S. Code or The Copyright Act, 1976 grant exclusive rights to the copyright holders. However under S. 107 of 17 U.S. Code, which deals with the doctrine of fair use, fair use is expansively and potentially applicable to any of the copyright owner’s entitlements. It says “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”

The doctrine of fair use in US is mainly evolved through series of decisions. In determining whether a given conduct constitutes copyright infringement, the courts have long recognized that certain acts of copying are defensible as fair use. In *Harper & Row v. Nation Enterprises*,<sup>6</sup> the Court had noted four factors to be used to determine whether the use was a fair one. The factors were:

1. The purpose and character of work;
2. The nature of the copyright work;
3. The substantiality of the portion used in relation to the copyrighted work as a whole;
4. The effect on the potential market for, or value of, the copyrighted work.

In *Dellar v. Samuel Goldwyn, Inc.*,<sup>7</sup> the Supreme Court held that the doctrine of fair use “the most troublesome in the whole law of copyright.” In *Time Inc. v. Bernard Geis Assocs.*,<sup>8</sup> it was held that “the doctrine of fair use is entirely equitable and is so flexible as virtually to defy definition.” Nonetheless the doctrine of fair use is unique in that the U.S. Supreme Court has repeatedly addressed its contours.<sup>9</sup>

Educational reprography was the most contentious issue in attempts to codify the doctrine of fair use during the mid-1960s and 1970s. In support of this contention that the fair use was insufficient to meet the needs of educational reproduction, educators asserted that the fair use had historically been applied only in commercial contexts involving competing uses.

In *Wibtol v. Crow*,<sup>10</sup> the Eighth Circuit Court held an educator liable for reprographic duplication of a copyrighted song and rejecting fair use as a defence to such copying. The Court held that as the defendant’s photocopying was a substantial one, fair use was denied. The concept of separate, non-profit educational fair use was thus rejected.

In *Williams & Wilkins Company v. United States*,<sup>11</sup> the Williams & Wilkins Company, a publisher sued National Institute of Health and the National Library of Medicine (NLM), agencies of the then Department of Health, Education and Welfare were alleged to have infringed the copyright by making photocopies of the articles published in the medical journals and distributing the same amongst students, physicians and scientists engaged in medical research. It was held that the

photocopying process did not even amount to printing or reprinting in the dictionary sense and the library was not attempting to profit or gain financially by the photocopying. The medical researchers who had asked the library for the photocopies and the scientific researchers and practitioners who need the articles for personal use in their scientific work and have no purpose to re-duplicate them for sale or other general distribution. Photocopying falls within fair use. It was accordingly concluded that there was no infringement of copyright.

In *Addison-Wesley Publishing Co. v. New York University*,<sup>12</sup> nine major publishers brought suit against the university, nine of its professors, and a commercial copy center for unauthorized photocopying of their copies. On April 7, 1983, settlement with the university and the professors was reached and under the settlement certain guidelines were made to be followed before photocopying such as obtaining permission of the publishers etc. The Copy Center was additionally ordered to pay plaintiffs an amount equal to its profits from the distribution of the works listed in the complaint and ordered to destroy all infringing copies in the possession.

It can be observed that despite the recognition of doctrine of fair use in its laws, US has been more inclined towards the pro-author regime.

### 3.3 United Kingdom

UK recognizes fair dealing under Sec. 29 (1C) of Copyright, Designs and Patents Act, 1988 which says fair dealing with a literary, dramatic, musical or artistic work for the purposes of private study does not infringe any copyright in the work.

UK also places restriction on fair dealing through Section 29 (3) which says that Copying by a person other than the researcher or student himself is not fair dealing; if in the case of a librarian, or a person acting on behalf of a librarian, does anything which regulations under section 40 would not permit to be done under Section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose. The Act allows a user to copy a passage of a book, but the problem arises if the user uses a photocopier to make the copy, because the typographical arrangement will be copied as well. Therefore, the defence applies also to typographical arrangements.

### 3.4 Canada

Canada also recognizes fair dealing under Section 29 of Copyright Act, 1985 which says that Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright. Diverting from the previous judicial decisions, the *CCH Canadian Ltd. v. Law Society of Upper Canada*,<sup>13</sup> laid down a new path for fair dealing. In this case a group of publishers sued the Law Society for Upper Canada in an infringement suit stating that photocopying services provided for the patrons has infringed their copyright. Chief Justice McLachlin held that there was no copyright infringement as it was well within the scope of fair dealing. She observed that the purpose of the

dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, the effect of the dealing on the work should be considered while considering the defence of fair dealing. In application of these factors to the facts McLachlin found that, given the restrictions put in place by the Law Society for copying the materials, the library was acting fairly.

This judgment or the approach of the Canadian Supreme Court was hailed as a “Pro-user” decision.

Apart from these, many countries like Australia, Singapore etc., have similar laws on fair dealing or fair use as a defence for copyright infringement.

#### **4. Importance of Education and Fair Dealing**

The right to education, envisioned at first as a Directive Principle of State Policy under the Indian Constitution, has now become a fundamental right, enshrined in the Constitution. Its implementation under Central and State legislation is still under way, but its evolution in fact extended over decades, and was initiated by the judiciary.

It is impossible to understand the challenges facing education in India and the critical importance of copyright law to it without putting the costs of learning materials into perspective. There is a common assumption that the cost of books in India is relatively low, and hence affordable. However, prices of books using a comparative purchasing power analysis reveals otherwise.<sup>14</sup>

The high production costs of scientific and technical books standing in the way of their dissemination in developing countries could be substantially reduced if the advanced countries would freely allow their books to be reprinted and translated by underdeveloped countries.<sup>15</sup>

Given the recognized need for and promise of education, the incredibly high costs of educational materials in the developing world, and the prevalence of piracy, the importance of copyright law for developing countries is clear. Developing countries must structure their copyright laws in ways that maximize the availability of low cost books, as well as the ability of educational institutions to provide learning materials through distance learning programs without having to pay prohibitively high royalties.<sup>16</sup>

One of the most important ways of promoting equitable access in the area of education is by ensuring that copyright laws have strong exceptions and limitations that enable the fair use of material for educational purposes.<sup>17</sup> Exceptions and limitations can be in the form of statutory or compulsory licenses, or they can be incorporated into fair dealing provisions. These exceptions can either be compensated or uncompensated, though generally within the context of fair dealing provisions, uses are uncompensated.<sup>18</sup>

#### **5. Indian Position- “A Pro-User Regime”**

In developing countries like India, there are many challenges being posed to the educational system. One of those is the exorbitant pricing of learning materials, which makes it difficult for students,

researchers etc., from various socio-economic backgrounds to get free access to the same. The Indian law, more or less in this regard, has become a rescuer of academicians almost trying to cover up the hindrance caused to them by the unusual pricing. Under its constitutional obligations and in view of public interest, the law allows an exception of fair dealing to provide access to those copyrighted materials. The main legislation dealing with these aspects is the Copyright Act, 1957. Section 52 (1) (h) says-

The reproduction of any work-

- i. By a teacher or a pupil in the course of instruction;
- ii. as part of the questions to be answered in an examination; or
- iii. In answers to such questions; not to be infringement of copyright.

The next educational exception, section 52(1) (i), allows for:

(i) the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students 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.

The principles of fair dealing for academic purposes can be best understood in the light of the recent judgment of Delhi High Court which is hailed as a victorious one in the field of fair dealing.

In the case of *The Chancellor, Masters & Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services & Anr.*,<sup>19</sup> suit was instituted for the relief of permanent injunction restraining the two defendants namely Rameshwari Photocopy Service carrying on business from Delhi School of Economic (DSE), University of Delhi and the University of Delhi from infringing the copyright of the plaintiffs in their publications by photocopying, reproduction and distribution of copies of plaintiffs' publications on a large scale and circulating the same and by sale of unauthorized compilations of substantial extracts from the plaintiffs' publications by compiling them into course packs/anthologies for sale. The plaintiffs contended that the course packs etc., directly competed with their market in sale of text books in the field of education. They also contended that DSE facilitated the photocopying of course packs by giving license to Rameshwari photocopy service and also encouraged students' purchase the course packs instead of the text books. The reproduction of the works of plaintiffs is not by a teacher or pupil and not in the course of instruction. The defendants contended that there was no violation of copyright and the activities carried on were under the umbrella of fair dealing. Rameshwari photocopy service pleaded that it had been granted license with respect to a small shop within the campus of DSE to provide photocopy services to students and faculty at nominal rate and as per the terms of license. The services of the photocopier are availed by faculty and students in the course of instruction and the books or articles or course packs etc., are photocopied only for educational purposes or reference only.

The Delhi High Court held that making of course packs comes under Sec. 52 (1) (h) which says that reproduction of a work by a "teacher or pupil in the course of instruction" and therefore there is no

copyright infringement. It also held that this provision should not be interpreted restrictively keeping in mind the societal realities of the system of education in India. The Court further held that in the course of instruction would include reproduction of any work while the process of imparting instruction by the teacher and receiving instruction by the pupil continues. This process begins from the time when the teacher starts to prepare himself/herself for the purpose of teaching the students to the time when the student prepares notes to reproduce what was taught to him or her. This shall also include clarifying doubts, holding tests and answering questions in the examination. Resultantly, reproduction of any copyrighted work by the teacher for the purpose of imparting instruction to the pupil as prescribed in the syllabus during the academic year would be within the meaning of Section 52 (1)(h) of the Act. It also held that Rameshwari photocopy service was not a competitor and it was granted license in the same was as it is done in High Court. It affirmed that when modern technology is available for comfort, it would be unfair to say that the students should not avail thereof and continue to study as in ancient era. No law can be interpreted so as to result in any regression of the evolvement of the human being for the better. Therefore the High Court concluded that there was no copyright infringement of plaintiffs by the defendants.

On October 05, 2016, the Plaintiff-Publishers filed an appeal against this decision before the Division Bench of the Delhi High Court. The court admitted the appeal on October 6 but refused to grant an interim injunction against Defendant No. 1 that the Plaintiff-Publishers prayed for. However, it directed the Defendants to maintain a record of photocopied course packs sold.

On December 9, 2016, The Division Bench, comprising Justices Pradeep Nandrajog and Yogesh Khanna, had refused to grant an interim injunction to the publishers, emphatically ruling that making and distribution of course packs to students does not amount to copyright infringement as long as the inclusion of the works photocopied was justified by the purpose of educational instruction.

On January 30, 2017, the Single Judge had refused to allow IRRO and the publishers' associations, Association of Publishers in India (API) and the Federation of Indian Publishers (FIP) (who had intervened in the appeal before the Division Bench) to intervene or be impleaded in the remanded proceedings before it, holding that the Division Bench had remanded the suit only for a factual determination as to the purpose of inclusion of the copyrighted works in the course packs and no party except the plaintiff-publishers had a say in it.

On March 09, 2017 a joint statement was released by Oxford University Press, Cambridge University Press and Taylor & Francis. They stated that "We have taken a considered decision not to pursue the Delhi University Photocopy shop case further in the courts and will today be filing an application with the Delhi High Court to withdraw as plaintiffs. In addition, we will not be submitting an appeal to the Supreme Court of India, following the Delhi High Court Division Bench appeal decision of 09 December, 2016. Further they stated that "We continue to stand by our principles stated throughout this case. We support and seek to enable equitable access to knowledge for students and we understand and endorse the important role that course packs play in the education of students. We support our authors in helping them produce materials of the highest standard and we maintain that copyright law plays an important part in balancing the interests of those creating, curating, and disseminating learning materials with those requiring access to them.

We look forward to working even more closely with academic institutions, teachers and students to understand and address their needs, while also ensuring that all those who contribute to and improve India's education system including authors and publishers continue to do so for the long term."<sup>20</sup>

The Indian Reprographic Rights Organisation (IRRO) filed a Special Leave Petition before the Supreme Court challenging the judgment passed by the Division Bench of the Delhi High Court on December 09, 2016 and it was rejected on May 05, 2017.<sup>21</sup>

## 6. Observations and Conclusion

Copyright recognizes the right of an author and provides him with an exclusive right to exclude others from using it without his permission. There are always exceptions to this and the prominent one of them is "Fair Use". Fair use for academic purposes is recognized as an exception by almost all the countries providing copyright protection. We can observe that countries like USA are more inclined towards protection of works of authors due to their capitalistic approach. Whereas countries like India have moved towards pro-user regime. This is due to their constitutional obligations and societal realities.

To ease the financial burden on students from buying expensive books for reference and fulfilling their academic curriculum and having only limited copies of such books being available with the library, not enough to cater for the needs of all the students, the libraries or under teachers instructions, allows the students to obtain copies of such books by photocopying for their own reference and study. This comes under fair dealing. Even clicking photographs of each page of the portions of the book required to be studied by the student and thereafter by connecting the phone to the printer and taking print of the said photographs or to read directly from the cell phone also falls under the head of fair dealing.

The Delhi High Court rightly held that "Copyright, especially in literary works, is thus not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to increase and not to impede the harvest of knowledge. It is intended to motivate the creative activity of authors and inventors in order to benefit the public."

In India, Copyright Act is a piece of welfare Legislation and the rights of authors and owners are to be balanced with the competing interest of the society. However, it should not be blatantly made against the authors which would in course, turn the tide upon the educational system. A balance should be maintained in recognizing the rights of the authors as well as providing access to the users.

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