

COPYRIGHT COMMENT

Win for Delhi university shop



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V Mohini and **Shreyosi Pal** examine the Delhi High Court's 'path breaking' judgment that photocopying materials for educational course packs is not an infringement

A judgment likely to have significant bearing on copyright jurisprudence in India was passed by the High Court of Delhi on 16 September 2016, when it dismissed a copyright infringement suit brought by international publishers Oxford University Press, Cambridge University Press and the Taylor and Francis Group against sale of photocopied course packs by Rameshwari Photocopy Services – a licensed photocopy vendor of the University of Delhi (DU).

In the court's opinion, the activities complained of by the plaintiffs fell under the 'fair use' exceptions of the Indian Copyright Act, 1957 ("Act"). This interpretation, lauded by some and criticised by others, is worth a closer look.

Background

Filed in 2012, the lawsuit was accompanied by an application of the plaintiffs seeking relief by way of a temporary injunction against sale of the disputed course packs during the pendency of the suit. This led to the court appointing a commissioner to prepare an inventory of all alleged infringing/ pirated copies of the plaintiffs' publications at the premises of the University of Delhi. Five photocopying machines were found that were being used to photocopy extracts from books – copyright of which was owned by the plaintiffs – for compilation and sale as course packs to students. Subsequent to these findings, on October 2012, the court restrained the university from making, copying or selling course packs until final disposal of the application for temporary injunction. The operative part of its order

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read – “the photocopier has no right to compile such course packs and books/articles published by the plaintiffs and more so, when university has taken a stand that they have no intention to breach any law by making such reproductions.” The court also directed the university to examine the plaintiffs' proposal of obtaining licences from the Indian Reprographic Rights Organisation (IRRO) – an Indian copyright society created/owned by authors and publishers to license reproduction rights of books and other publications) ensuring payment of suitable royalties to the publishers for preparing the course packs in question.

Reportedly, the publishers' books at issue would cost students over Rs 7,000 (\$100) while the course packs at the university were being sold to them for Rs 200 (\$3). Given average household incomes in India, many students would find it impossible to afford books for Rs 7,000. The matter thus came to be regarded as one involving 'access to education'. It saw intervention petitions filed by groups of students and academics – Association of Students for Equitable Access to Knowledge (ASEAK) and Society for the Promotion of Educational Access (SPEAK) both of whom impleaded as co-defendants.

Rights of publishers v right to education?

The publishers' main grouse was the university's direct encouragement/recommendation to its students to purchase the photocopied course packs instead of legitimate copies of the publisher's texts. Looking to preserve their interests, the publishers contended that if copyright in works such as theirs was not protected, the publication business would suffer a great blow. However, the publishers did submit that their objective was not to stop students from photocopying their texts, rather they merely wanted to end the systematic photocopying of their publications.

The university averred that no document has been produced by the publishers to establish their copyright, and acts by the university amounted to 'fair use' of the works within the meaning of Section 52 of the copyright statute. Further, the question of seeking licences from the IRRO arose only if the court came to the conclusion that the making of course packs was not covered under the

exceptions to infringement provided under the Act. Also, given the facts and circumstances of the case and that the right to education finds a mention in the Constitution of India as a fundamental right, the question of copyright had to be judged in light of “access to knowledge”.

The Delhi High Court determined that the issue for adjudication before it – whether the making of course packs amounted to infringement of the publishers’ copyright – was a question of law involving no trial. Setting the tone of the judgment, the court began by explaining the nature of copyright as, “Copyright, especially in literary works, 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. 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.”

It recognised that copyright is a statutory right and according to the provisions of the Copyright Act, photocopying an original literary text qualified as ‘reproduction of the work’ – an exclusive preserve of the copyright owner. However, this right is subject to statutory exceptions and Section 52(1)(i) of the Indian Copyright Act excludes the reproduction of a work by a ‘teacher/ pupil in the course of instruction’ from the scope of infringement. The question then arose whether the scope of this provision was restricted to an ‘individual teacher and an individual pupil’ or whether it could extend to an ‘educational institution and all its students’. Recognising that education in India is imparted primarily via institutions, the court favoured the latter interpretation. It also looked into the meaning of the phrase ‘course of instruction’ and decided the term was not limited to classroom interface where the teacher directly interacts with the pupils and in doing so, uses copyrighted work. Examining various judicial interpretations of the phrases ‘instruction’ as well as “in the course of”, it came to the conclusion ‘course of instruction’ under Section 52(1)(i) would include reproduction of any work during the entire academic session for which the pupil is under the tutelage of the teacher, such as post lecture study and encompass reading materials prescribed under the syllabus including photocopied course packs such as those compiled by Rameshwari Photocopy Services.

The court further observed that India being a country with a large population, there was

enormous pressure on all public resources and facilities including libraries at the University of Delhi. Had the texts in question been copied by university students individually for personal use, whether by hand or photocopy machines, the publishers might have considered it ‘fair use’ and found no cause to complain. In the court’s opinion, the 100 or 1000 copies being made by the photocopy vendor were not materially different. If the act of copying for a particular purpose is not in itself regarded as illegal, merely adopting a superior technology (photocopy machine v copying by hand) or different route to achieve the same result ought not to change the action to an illegal one. Also, the photocopy service provider was not a competitor of the plaintiffs, as they were only compiling excerpts of textbooks for university students. Were such compiled course packs disallowed, constrained by resources, students would resort to copying the pages individually rather than resort to purchase of the full textbooks.

Finding that the defendants’ actions did not amount to infringement, the plaintiffs’ suit was dismissed.

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Implications

This judgment of the Delhi High Court is path breaking for it interprets fair use provisions under the copyright statute broadly, with a view to enable better access to education in a country where many students lack adequate resources. For some, such reasoning harms the letter and spirit of copyright law – remedies to improve access to works already exist under the copyright statute including provisions of compulsory licensing. Others argue that such mechanisms are complicated and rarely

implemented.

Another concern that arises is that of full-text copying and if the judgment brings photocopy of full books under the fair use exception. The facts of the case did not encompass copying of entire books and the judge did not specifically rule on this issue. In terms of the statute, Section 52(1)(i) does not qualify the quantum of content that may be copied. Yet in the instant case, most of the alleged copying involved no more than 10% of a copyrighted book. To avoid potential overreach in future cases, careful application must be made of the ruling under discussion, keeping in mind the specific facts and circumstances of each individual matter.

Further developments

The issue has not been put to rest. The publishers challenged the decision of the single judge by filing an appeal before a division bench (two judge bench) of the Delhi High Court.

Refusing the publishers’ request for an interim stay on the single judge’s order, the division bench chose to hear the matter in detail. Soon after, by way of a very quick delivery of judgment, on 9 December 2016, the bench disposed of the appeal and partially upheld the order of the single judge in that it found no case to halt the making of course packs by Rameshwari Photocopy Services. Significantly, the division bench acknowledged that though courts the world over consider four specific factors while testing for ‘fair use’ of a copyrighted work, namely, the purpose of the use, the amount and substantiality of the portion used, the nature of the work and the effect of the use on the potential market, in light of India’s education mileau, the test of ‘fair use’ turned on the ‘purpose’ of the use.

The division bench, however, differed from the single judge on the latter’s finding that the main suit had no triable issues. Per the bench, issues for determination by the court included questions on whether the inclusion of copyrighted work in the course packs was necessary for instructional use by the teachers and an enquiry into the report of the local commissioner dated 27 August 2012, where it had been found that certain books of the publishers were being copied in entirety. Both issues will have to be proved by parties by leading evidence through cross examination of witnesses, as well as testimony of expert witness.

All sides now wait to see if the publishers are going to appeal the division bench’s order to the Supreme Court or go to trial before the single judge.

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