

THE COPYRIGHT ACT AND ITS EFFECT ON THE RIGHT TO EDUCATION: A CRITICAL ANALYSIS

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ABSTRACT

This article attempts to analyse the extent of the right of the students to copy copyrighted materials such as course books for educational purposes. It attempts to look at The Copyright Act as amended in 2012 and the exceptions provided in the legislation and the scope of these exceptions. The article moves onto a multidimensional analysis of The Copyright Act in relation to The Constitution of India, and whether the legislation is in consonance with the Constitution. The article also attempts to understand the impact of copying copyrighted works for purposes of knowledge on the educational rights guaranteed under the Constitution. The article also attempts to understand the situations under which copying might be permitted, and the reasons for the same. Further, the article analyses various cases from around the world in an attempt to understand the position of different countries on the extent of copying that is legally permitted. Finally, the article looks at the jurisprudence and social aspects of the right of students to copy materials for educational purposes as against the right of the copyright holders such as authors and publishers who have a

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right to earn profit for the labour, skill and capital they have invested in creating a book.

1. INTRODUCTION

In recent years a number of law review articles and recent Harvard University Press publication have all sought to tackle the question of academic ownership, with many of the works titled something like, “Who owns academic work,” and “Who owns course materials.”⁶⁰ One work in the last year that received a good deal of attention was that of Corynne McSherry, called *Who Owns Academic Work: Battling For Control Of Intellectual Property* (2001). McSherry’s argument seems to discourage academics from using the law and court systems to protect their work, demonising those who do and accusing them of changing the tone of the university into a space fearing litigation. She also suggests that academics should not ask for anything more than what they are given, for fear of losing a gift economy, safe from a commercialized space.

In the summer of the year 2012, the prestigious Delhi University (hereafter, the University) and a photocopying store on its Campus, Rameshwari Photocopying Services (hereafter, the photocopiers) were accused of having infringed the copyright laws laid down by The Copyright Act of 1975 (hereinafter, the Copyright Act) by publishers Oxford University Press, Cambridge University Press and Taylor &

⁶⁰ Corynne McSherry, *Who Owns Academic Work: Battling For Control Of Intellectual Property* Harvard University Press, United States, 2009; see also Georgia Holmes and Daniel A. Levin, “Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age”, *B. Y. U Education and Law Journal*, Vol. 2000, No. 1, April-June 2000, p. 165, and Gregory Kent Laughlin, “Who Owns the Copyright to Faculty Created Web Sites?: The Work for Hire Doctrine’s Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses”, *Boston College Law Review*, Vol. 41, No. 3 2000, p. 549.

Francis⁶¹ (hereinafter, the publishers). The publishers have alleged the reproduction and issuing of their publications in the most “illegal and unauthorised manner” by the photocopiers at the instance of the University.⁶² The publishers thereby initiated a suit against the University and the photocopiers for permanent injunction, restraining infringement of copyrights, damages, rendition of accounts of profits and so forth.⁶³ They also asked that the distribution of the compilation be stopped immediately, as the distribution of the ‘pirated’ copies would cause them revenue losses.⁶⁴ The photocopiers’ shop was subsequently raided and an inventory of all the pirated copies was made, and the copies were seized.⁶⁵ The incident left the world of academia stunned, and many academicians, lawyers and scholars have expressed their shock about the matter.

The right to free and compulsory education in India, however, has been granted as a Fundamental Right under Article 21A of the Constitution.⁶⁶ While this article talks about free and compulsory education to children aged between six and fourteen years of age, Article 41 of the Constitution provides that the state shall provide for education to its citizens. Education in India has been recognised as the most important way of attaining development and redressing inequity. In fact, in his address to the nation on August 15 2007, commemorating 60 years of independence, Prime Minister Manmohan Singh pronounced education as the “foundation on which a progressive, prosperous society can be built.”⁶⁷

⁶¹ Staff Reporter, “Delhi University, photocopy service in the dock over piracy”, *The Hindu*, August 14, 2012.

⁶² *Ibid.*

⁶³ *The Chancellors, Masters and Scholars of the University of Oxford & Ors. v. Rameshwari Photocopying Services & Anr.*, CS (OS) 2439/2012

⁶⁴ *Supra* Note 1.

⁶⁵ *Ibid.*

⁶⁶ *The Constitution of India*, 1950, Article 21 A.

⁶⁷ Lawrence Liang, “Exceptions and Limitations in Indian Copyright Law for Education: An Assessment”, *The Law and Development Review*, Vol. 3, No. 2 (2010), pp.200 – 210.

Education today, has been brought within arm's reach for many people in the Indian society. The continuing development of information and communication technologies have presented for the people a wealth of opportunities for creative interventions to help close the educational gap. This development in technology may seem to be very promising in helping to transcend geographical limitations in education, enabling wider dissemination of learning materials as well as allowing for collaborative learning and production of learning materials. In fact, the internet has the centrality of future education. The internet enables self-learning in ways once not thought possible, significantly reduces the costs of learning materials, and allows for interactions to take place across borders.⁶⁸ An older and almost as commonly used technology in sharing educational material has been through the photocopiers.

2. DEFINING THE AMBIT OF THE COPYRIGHT ACT:

1.1. SCOPE OF SECTION 51 OF THE COPYRIGHT ACT

Section 51 of the Copyright Act⁶⁹ enunciates the general rule that copyright in a work shall be deemed to be infringed in certain cases. This Section enunciates the rule that certain acts shall not constitute the infringement of copyright. In other words, all reproduction is not precluded, and the section specifies the instances in which it may be permitted. Thus, while Section 51 enacts the general rule that reproduction of the whole or a substantial part of a copyright work will constitute infringement, this section enunciates the rule that all reproduction is not precluded and specifies the instances in which it is permitted.⁷⁰

Several classes of cases of reproduction have been held to be fair, and hence not an infringement; such as:

- a. Fair quotation

⁶⁸ *Ibid.*

⁶⁹ The *Copyright Act*, 1957, s. 51.

⁷⁰ Dr. Raghubir Singh, *Iyengar's The Copyright Act*, Universal Law Publishing Co., New Delhi 2010.

- b. Extracts from comments and criticism
- c. Bona fide abridgements, and so forth⁷¹

Other cases of reproduction may be recognised when they arise. Each case would depend on its own circumstances. All uses of a book are dedicated to the public, except as reserved by statutes.⁷² Under certain circumstances, and for some purposes, a subsequent author may draw from previous works its identical words, and make use of them, particularly in works with regard to arts and sciences. This includes medical and legal publications, in which the entire community has an interest.⁷³

1.2. UNDERSTANDING FAIR DEALING WITH REFERENCE TO EDUCATIONAL INSTITUTIONS

Section 52 of the Copyright Act⁷⁴ deals with the concept of fair dealing, by specifying what shall not constitute the infringement of copyright. This section was first amended by the Copyright (Amendment) Act, 1983, and thereafter by the Copyright (Amendment) Act, 1994. This section mainly deals with what is known as 'fair dealing' or 'fair use'.⁷⁵ Fair use of copyright material is the extra legal use, which is usual, reasonable and customary.⁷⁶ Copyright is provided for the purpose of promoting the progressive science and the usual arts. Therefore, the use of copyright material, even to the extent of some copying is, under certain circumstances, not an unlawful use. Such lawful use comes under the description of 'fair use'. The Copyright Act provides statutory defences to claims for infringement of copyright. One such statutory defence is a fair dealing with a literary, musical, artistic or dramatic work for the purpose of research or private study; or criticism or review, whether of that work or of any other work. Before publication, there can be no fair use of works protected under the common law of copyrights. As long as the author

⁷¹ *Ibid.*

⁷² *West Publishing Co. v. Thompson Co.*, 169 Fed Cas 539 833 (861).

⁷³ *Sampson and Murdock v. Seaver-Radford Co.*, 140 Fed Cas 539 (541).

⁷⁴ *The Indian Copyright Act*, 1957 s. 52.

⁷⁵ *Ibid.*

⁷⁶ *Supra* note 11 at 395.

keeps his work confidential and does not communicate it, no one has a right to use it. After the work has been published, there may be a fair use, as well as an unfair use. In determining whether there has been a fair use, the Court must find:

- a. Whether there has been any substantial taking, and
- b. Whether there has been any use which might amount to

plagiarism.⁷⁷

If there has been no substantial taking or no plagiaristic use, like infringement of copyright, for instance, no question of fair or unfair use arises. If it is found that there has been plagiaristic use, then the question arises as to whether the use has been fair or unfair.⁷⁸ In the case of *Howkes and Sons (London) Ltd. v. Paramount Film Service Ltd.*,⁷⁹ the Chancery Court first took into account whether or not there had been any substantial taking from the musical work in question. The Court then proceeded to consider whether the taking was 'fair dealing', i.e., whether or not it fell within the exception.

The question whether the dealing has been fair or unfair depends on the circumstances of each particular case. The court must look at:

- a. the nature and object of the selection made
- b. the quantity and value of materials used, and
- c. the degree in which the use might prejudice the sale,

diminish the profits or supersede the objects of the original work.

The provisions under this Section were upheld in the case of *Academy of General Education, Manipal v. B. Manini Mallya*,⁸⁰ where the Supreme Court held that "Section 52 of the Copyright Act provides for certain acts which would not constitute an infringement of copyright. When a fair dealing is made *inter alia*, of a literary or a dramatic work for the purpose of private use including and not limited to research, criticism

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Howkes and Sons (London) Ltd. v. Paramount Film Service Ltd.*, (1934) Ch. 593; See also *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, (1964) 1 All ER 465.

⁸⁰ *Academy of General Education, Manipal v. B. Manini Mallya* 2009 (39) PTC 393 (SC).

or review, whether of that work or of any other work, such a dealing does not constitute an infringement of copyright.”

The Copyright Act is a piece of welfare legislation.⁸¹ That said, the legislation aims at protecting and safeguarding the interests of authors and owners.⁸² It cannot be lost sight of the same very legislation balances the competing interest of the society and those who are members of the society so that the protection given to the authors should not unnecessarily infringe upon the legitimate acts done by bona fide persons. The Copyright Act⁸³ clearly provides exceptions⁸⁴ so far as it relates to reproduction of any work done, the said provision has to be interpreted in the light of corresponding benefit which will be given to the children and youth by enabling them to study the books and making them available at reasonable costs. This it does by providing photocopies of selected pages of chapters from the prescribed books for educational purposes.

The preamble of the constitution of India calls India a socialist country. Justice Kuldip Singh said, “The fundamental rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity. The “right to education”, therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society.”⁸⁵

It can be clearly seen that if the photocopying of educational books are not allowed then the future of our country will be hampered, as knowledge will become the prerogative of the elite section of society.

⁸¹ *Miller v. Taylor (1769)* 4 Burr 2303 (2335).

⁸² *Ibid.*

⁸³ *The Indian Copyright (Amendment) Act, 2012.*

⁸⁴ *The Indian Copyright (Amendment) Act, 2012*, s. 52.

⁸⁵ *Mobini Jain v. State of Karnataka* AIR 1992 SC 1858 ¶¶ 13-14.

The high costs of these books will make it impossible for a significant section of the population. It must be kept in mind that India is a developing nation and a huge section of its population live below the poverty line or in just the basic sustenance level. In such a situation, even if an individual wants to pursue higher education, the high costs of access to education will limit his opportunities of growth. We must not see it as the loss of the individual but as a loss of the nation to effectively nurture its citizen and provide them opportunities for growth and self-realisation.

In a similar Canadian case of *Alberta (Education) v. Canadian Copyright Licensing Agency*,⁸⁶ the Canadian Supreme Court also ruled “It was neither artificial nor unreasonable to conclude that the photocopies mainly serve the teacher’s purpose of teaching and that this was the relevant and predominant purpose of the dealing.”

3. FAIR DEALING:

1.3. UNDERSTANDING ‘FAIR USE’

To prevent copyright from becoming a hindrance to the legitimate use of works in which copyright subsists in furtherance of knowledge, the Copyright Act provides exceptions in the manner and circumstances detailed in the several clauses of the section. Such fair use is not an infringement of copyright under the act. It is often difficult to say:

- a. Whether an alleged act of copying from an original work in which copyright subsists amounts to piracy? or
- b. Whether an alleged act of copying may or may not be justified on the ground of fair dealing? or
- c. Whether the use made of the work in which copyright subsists does not exceed what the law permits?⁸⁷

However, there is considered to be an infringement of copyright, if:

⁸⁶ *Alberta (Education) v. Canadian Copyright Licensing Agency*, [2012] 2 S.C.R 345

⁸⁷ *Supra* note 11 at 396.

- a. So much is taken that the original is sensibly and materially diminished, or
- b. The labour of the previous author is substantially, and to an injurious extent appropriated by the defendant.⁸⁸

The question of piracy often depends upon:

- a. A balance of the comparative use made by the defendant of the materials of the plaintiff;
- b. A determination of the nature, extent and value of the materials used;
- c. The object of each work; and
- d. The degree to which each author may be fairly presumed to have restored to the same common source or sources, or to have exercised the same common diligence in the selection and arrangement of materials.

While the law of copyright protects authors and others against the use of their works without permission, the acts mentioned in this section are not in the interests of the public and of the various sections of the community. In some cases, the interests of the owners of the copyright themselves are regarded as the infringement of rights.⁸⁹

1.4. FAIR DEALING DEFINED

What is or is not fair dealing has been understood to depend upon the circumstances of each case. In determining the issue of fair dealing, the court should consider:

- a. The nature, scope and the purpose of the works in question – if the works are similar in these aspects, they may be regarded as competitive. If so, the latter publication might interfere with the sale and diminish the profits of the earlier work, thereby causing substantial injury to the owner of the copyright in the earlier work. If, however, they are different in their nature, scope and purpose, the latter has a greater

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

liberty to make quotations and take extracts from the work in which copyright subsists. However, it is important to note that the use of quotations for a profitable commercial purpose does not fall under the ambit of fair use.

- b. The extent, relative value, purpose and effect of the material appropriated – the real criterion, in this case, is the quality of the work, rather than the quantity, because the most vital part of the work may be small in quantity as compared to the whole work. However, infringement is also said to have taken place if a substantial amount of the work has been appropriated.
- c. Intent – although intent is not material for infringement of copyright, it is considered to be an important element in determining fair use.⁹⁰

While fair dealing has not explicitly been defined in the Copyright Act, Section 52 (1)(a)⁹¹ specifically mentions that ‘fair dealing’ very different from ‘reproduction’ of any work. Justice A.K. Sikri, in the case of *Syndicate of The Press of The University of Cambridge on Behalf of The Chancellor, Masters and School v. B.D. Bhandari*⁹² & Anr. and *The Chancellor Masters and Scholars of The University of Oxford v. Narendra Publishing House and Ors.*⁹³ was of the opinion that “When we talk of ‘fair use’, it would in the context mean that there is someone who enjoys copyright in that work, but the user thereof comes within the domain of eventualities provided under Section 52 of the Copyright Act.⁹⁴ In the same case,⁹⁵ Justice Sikri also observed that “when plea of fair use under Section 52 of the Copyright Act is adopted by the Respondents what is expected from the Court on the application of the provisions of Section 52 of the Act is not to examine whether the activity is

⁹⁰ *Ibid.*

⁹¹ The *Indian Copyright Act*, 1957 s. 52(1).

⁹² *Syndicate of The Press of The University of Cambridge on Behalf of The Chancellor, Masters and School v. B.D. Bhandari & Anr.* (2011) 185 DLT 346.

⁹³ *The Chancellor Masters And Scholars of The University of Oxford v. Narendra Publishing House and Ors.* 2008 (106) DRJ 482

⁹⁴ *Supra* Note 15.

⁹⁵ *Supra* Note 33, 34.

infringement is not, but to examine whether the conditions stated in a particular clause of *Section 52* of the Act invoked by the respondents is satisfied or not.” In other words, for any piece of work to be considered reproduced, three things have to be taken into consideration: the quantum and value of the matter taken in relation to the comments or criticism; the purpose for which it is taken; and the likelihood of competition between the two works.

Another question that comes up when the issue of ‘fair dealing’ is taken up is how much of the work constitutes fair dealing. In the case of *Chatrapathy Shanmughan v. S Rangarajan*,⁹⁶ the Madras High Court held that it was a settled position that an infringement of copyright would arise only when there was substantial reproduction of the plaintiff’s work. Similarly, in the case of *S.K. Dutt v. Law Book Co. and Ors.*, it was held that in order to be an infringement of a man’s copyright there must be a substantial infringement of the work. A mere fair dealing with any work falls outside the mischief of the Copyright Act.

However, the May 2012 decision of the American case of *Cambridge University Press v. Becker*,⁹⁷ was the first case in which any Court defined and explained the ambit of ‘substantial infringement.’ In this case, 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. This decision has played a significant role in expanding the domain of fair use.

4. EXPLAINING FAIR DEALING:

Explaining something like fair dealing, which has not been defined in any statute or document is a task in itself. However, some Courts have come up with certain methods, which may be helpful in further understanding, and defining what comes under the umbrella of ‘fair dealing’. Perhaps the most commonly known and used test is called the four-factor test, which was developed by the American Courts. The

⁹⁶ *Chatrapathy Shanmughan v. S Rangarajan*, (2004) 29 PTC 702 (Mad)

⁹⁷ *Cambridge University Press v. Becker Case 1:08-cv-01425-ODE Document 423 Filed 05/11/12.*

four steps involved in this test are: the purpose and character of use; the nature of copyrighted work; the amount and substantiality of the portion taken; and the effect of the use upon the potential market.⁹⁸ The Supreme Court of the United States, however, lays emphasis on the first factor – the purpose and character of use, more commonly known as the transformative test. This factor is considered to be the primary indicator of fair dealing. Under the transformative factor, two issues are considered:

- 1) whether the material that has been taken from the original work has been transformed by adding new expression or value;
- 2) whether any value was added to the original work by creating new information, new aesthetics, new insights and understandings.⁹⁹

The second factor, that addressing the nature of the copyrighted work lays more emphasis on facts and information that has been taken from factual works like biographies and encyclopaedias, rather than fictionalised works like novels and stories. It also enunciates the greater value of the concept of fair dealing when the work is published rather than unpublished.¹⁰⁰ Understanding the third factor, which deals with the amount and substantiality of the portion taken, is fairly simple – the lesser that is taken from any copyrighted work, the more likely that fair dealing would be taken into consideration.¹⁰¹

The final, and perhaps most arguable aspect of the four-factor test is that of the effect of the use of the copyrighted work on the potential market. Essentially, this factor deals with the question of whether or not the use of the copyrighted work deprives the copyright owner of

⁹⁸ Rich Stim, 'Measuring Fair Use: The Four Factors' (2010) *Copyright & Fair Use, Stanford University Libraries*, available at <http://fairuse.stanford.edu/overview/fair-use/four-factors/> (last accessed 27 February 2014).

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

his income, or undermines a new or a potential market for the copyrighted work.¹⁰²

This, however, is not the only method of explaining and understanding fair dealing. The test for fair dealing was articulated much differently in *CCH Canadian Ltd. v. Law Society of Upper Canada*¹⁰³ as involving two steps. The first step was to determine whether the dealing was for the allowable purpose of “research or private study” under Section 29 of the Copyright Act of Canada, “criticism or review” under Section 29.1, or “news reporting” under Section 29.2 of the same Act. The second step assesses whether or not the dealing is “fair.”¹⁰⁴

5. DETERMINATION OF FAIR USE

The question of fair dealing does not arise until a substantial amount of the work has been reproduced to constitute infringement. Reproduction of a small part of the work, which does not constitute a substantial part of the infringed work is not infringement, for it is permitted. It is substantial that the infringement has been to an unfair extent.

The words ‘unfair use’ have a broader meaning with respect to the appropriation by reproduction of a substantial part of a work in which copyright subsists than they have upon the acquirement of knowledge by a student of the field treated by the publication.¹⁰⁵

A subsequent author, who, after a thorough study of a copyrighted work uses the knowledge so gained in his own work, may not be guilty of unfair use. A considerable portion of the material of the original work may be reproduced into another work, but only if it becomes indistinguishable from the original work, and constitute an original

¹⁰² *Ibid.*

¹⁰³ *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004) 1 SCR 339, 2004 SCC 13.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Supra* note 11 at 403.

work in itself. The fairness of the use depends upon the originality of the matter so copied and the exactness of the copy.¹⁰⁶

However, under the guise of copyright, a plaintiff cannot ask the Court to close all the avenues of research and scholarship and all other frontiers of human knowledge.¹⁰⁷

6. DEFINING THE PURVIEW OF 'FAIR DEALING' IN INDIA

Sub-clause (i) of section 52 (1)(a)¹⁰⁸ of the Copyright Act provides for the fair dealing of a literary, dramatic, musical or artistic work for the purposes of private use, including research. The object of this clause is to enable students to make copies of copyrighted work for their own personal use. However, these copies cannot be used by the students, or anybody else for profit, or other commercial purposes.¹⁰⁹

Section 52 (1)(zb)¹¹⁰ of the Copyright Act clearly excludes within the purview of infringement, any reproduction, adaptation, issuance of copies to facilitate the persons with disabilities to access such work for educational purposes. Here, it would be useful to define and understand the ambit of 'disabilities' as "Certain acts not to be infringement of copyright:- (zb) the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format, by - (i) any person to facilitate persons with disability to access to works including sharing with any person with disability of such accessible format for private or personal use, educational purpose or research; or (ii) any organisation working for the benefit of the persons with disabilities in case the normal format prevents the enjoyment of such works by such persons: Provided that the copies of the works in such accessible format are made available to the persons with disabilities on a non-profit basis but to recover only the cost of production: Provided further that the organisation shall ensure that the copies of works in such accessible format are used only by persons

¹⁰⁶ *Folsom v. Marsh*, 9 Fed Cas 342 (344, 348).

¹⁰⁷ *Ratna Sagar v. Trisea Publications* 64 (1996) DLT 539.

¹⁰⁸ *Supra* note 15.

¹⁰⁹ *Supra* note 11 at 406.

¹¹⁰ *The Indian Copyright (Amendment) Act*, 2012 s. 52.

with disabilities and takes reasonable steps to prevent its entry into ordinary channels of business.

Black's Law Dictionary defines the term 'disability' as 'inability to perform a certain function'. This will clearly cover the case of those who are incapable of having adequate access to education. It is but obvious that the at least some of the students who have been affected by the suit by the publishers will be included under the purview of 'disability' in its context of access to education, which under Article 41¹¹¹ of the Constitution of India (hereinafter referred to as the Constitution) is a constitutional guarantee.

Fair dealing with a literary work for the purpose of private, bona fide intended for the educational institutions is not an infringement of the copyright possessed by the author. In *V. Ramaiah v. K. Lakshmaiah*,¹¹² one Mocherla Ramakrishnaiah wrote *Girija Kalyanam*, which was approved by the Osmania University as one of the five subjects for B.A., B.Com., and B.Sc. students for Papers I and II. The respondent wrote a guide, called 'Sri Vidya Excellent Guide' to help the students in the language, Telugu Parts I and II under Exercises A. 19 to A. 23. According to the plaintiff, the book was assigned to him by the author under a deed dated 15th June 1937, and the respondent pirated his right as a copyright-holder. The respondent, however, pleaded that the writing of the guide would not amount to infringement of the copyright of the appellant, and that he used the words fairly to help guide the students, and a fair reading of the guide prepared by him showed that his act did not amount to infringement of Section 52 of the Act. The respondent also denied the appellant as the copyright holder. The Court, in this case held that the work in question did not amount to infringement.

Fair dealing, as one of the affirmative defences to infringement of copyright in India, places the onus of proving fair dealing on the user, once the owner has established prima facie infringement by substantial copying of expression, though it isn't substantially necessary that prima

¹¹¹ The *Constitution of India*, 1950 a. 41.

¹¹² *V. Ramaiah v. K. Lakshmaiah* 1989 PTC 137.

facie be proved before the application of fair dealing is considered.¹¹³ The courts have, however, time and again reiterated that it is impossible to develop a 'rule of thumb' for cases of fair dealing as each case depends upon the facts and circumstances of that case.¹¹⁴

7. A COMPARATIVE ANALYSIS OF THE USA, INDIA AND CANADIAN SITUATIONS REGARDING COPYRIGHT AND PRINT DISABILITY

The Indian situation on the right of a print-impaired person to utilise copyrighted work in print or electronic format solely for educational purposes is not clear yet as the Apex Court is yet to arrive at a decision regarding the Delhi University case. This, however, is not the case in other more developed countries like USA and Canada.

In Canada as referred earlier in the case of *Alberta Education*,¹¹⁵ it was held that copying material for teaching in classrooms would be permissible. This is a welcome legislation, which delicately balances the requirements of both the students and the copyright holders. However, the question of what constitutes a classroom has not been defined. In this digital age, a classroom can mean a virtual classroom, traditional classroom and in any other such situation where a teacher is giving private tuitions to a student in the students' house. The Indian Courts should take notice of this case and they should allow students to photocopy material for classroom use. The scope and definition of classroom should be liberal and the ambit should be wide. The narrow definition of the word classroom will only impede the very objective of furthering the cause of education.

In the American decision of *Cambridge University Press v. Becker*,¹¹⁶ the threshold for copying has been pegged at 10 percent of the total

¹¹³ *Civic Chandran v. Ammini Amma* 1996 PTC 16 670.

¹¹⁴ *ESPN Star Sports v. Global Broadcast News Ltd. and Ors.* 2008(36) PTC 492 (Del).

¹¹⁵ *Alberta (Education) v. Canadian Copyright Licensing Agency*, [2012] 2 S.C.R 345.

¹¹⁶ *Cambridge University Press v. Becker Case 1:08-cv-01425-ODE Document 423 Filed 05/11/12.*

text of the book. It must be kept in mind that America is a Capitalist country whereas our Country is founded on socialist principles. Therefore, the threshold for copying in India must necessarily be significantly higher than America with an aim to provide justice and access to education to the teeming millions who can barely afford to put two square meals together.

Even developing countries like Costa Rica have made clear their stand on the prevailing issue. *“Thousands of students participated in a march in San José on Tuesday, October 9, 2012, protesting for their right to photocopy textbooks for educational purposes. The unrest was caused by President Chinchilla vetoing Bill 17342 (known as the 'Photocopying Law') which seeks to amend Law No 8039 on Procedures for Enforcement of Intellectual Property Rights, on the grounds that it removes protection of the work and intellectual property in the artistic, literary and technological areas.”*¹¹⁷ This would prohibit students from photocopying textbooks for educational purposes, textbooks that they simply cannot afford to purchase. It has been noticed that American and British publishers have been trying to impose Western prices on third world countries. It must be understood that if that happens then a majority of the population will not be able to afford the books and by extension will be disabled for life. In a view to protect social justice and follow the protest, Costa Rican President Laura Chinchilla, by way of a presidential decree, extended an exception to Law 8,039 and allowed photocopying academic material even if the photocopy shop makes a profit.

India should take a cue from this and take a similar stand with regard to photocopying instead of condemning small-time photocopy shops which run on meagre profits and poor students. The social justice objectives of the preamble should not just be mere words, but it must be enforced through legislation and judicial interpretation.

¹¹⁷ Jenny Cascante Gonzalez, ‘Costa Rica: Students Protest Veto of Photocopying Law’ *Infojustice.org*, available at: <http://infojustice.org/archives/27502>. (last accessed on 21st June 2014).

8. UNDERSTANDING THE RIGHT TO FREE AND COMPULSORY EDUCATION

1.5. RIGHT TO EDUCATION AS A CONSTITUTIONAL RIGHT

The right to education, in India may be seen as a natural extension of the argument for the expansion of the scope of the right to life and personal dignity. The Supreme Court, by introducing the right to life as a qualitative concept as under Article 21, has ensured that any aspect that falls under establishing ‘quality of life’ falls under the wider ambit of Article 21. As a result, many Directive Principles of State Policy that were hitherto unenforceable and non-justiciable have become enforceable under Article 21. Further, the Supreme Court has also implied a number of fundamental rights from Article 21 even though these rights have not been expressly provided for under the Constitution. The right to education as under Article 21A of the Constitution is perhaps the most important of these implied rights. The word ‘life’ has been held to include ‘education’ as education is one of the important, perhaps the most important of the necessities to a life of human dignity.¹¹⁸

The right to education in India was granted as a Fundamental Right under the Constitution by the 86th Amendment Act of 2002, under Article 21A 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.” As the Supreme Court famously held in the case of *Mohini Jain v. State of Karnataka*, that the right to education flows directly from the right to life and that the right to education was concomitant to the fundamental rights. The court opined “*it becomes clear that the framers of the Constitution made it obligatory for*

¹¹⁸Inclusive Planet, The Centre for Internet & Society, & Alternative Law Forum, ‘Right to Knowledge for Persons with Print Impairment: A Proposal to Amend the Indian Copyright Regime’ (November 2009) *Inclusive Planet, The Centre for Internet & Society, & Alternative Law Forum* available at <http://cis-india.org/accessibility/publications/uploads/Case%20for%20Amendment%20of%20Copyright%20Regime%20in%20India%20November%202022-%202009.pdf> (last accessed 22nd June, 2014)

*the State to provide education for its citizens*¹¹⁹ right to education is indeed imperative to ensure the right to life and personal dignity of every Indian citizen. The Court further reiterated this position in the case of *Unni Krishnan v. State of Andhra Pradesh*.¹²⁰

While this article granted the right to free and compulsory education for children aged between six and fourteen years of age, the amendment also substituted the following provision for early childhood care and education to children below the age of six years, in the place of Article 45 as a Directive Principle of State Policy.

1.6. THE LINK BETWEEN EDUCATION AND COPYRIGHT

Given the recognised need for and promise of distance 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 maximise 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.¹²¹

The link between copyright and learning is indeed an old one, and the free dissemination of knowledge and culture has always informed the normative spirit of copyright law. The first copyright statute, The Statute of Anne, was titled An Act for the Advancement of Learning. This approach, which emphasised public interest in the circulation of knowledge, was the philosophical basis for granting limited exclusive rights to authors. Today, the concern for the public interest has been recognised by all major international institutions and clearly articulated

¹¹⁹ *Mohini Jain v. State of Karnataka* 1992 SCR (3) 658.

¹²⁰ *Unni Krishnan v. State of Andhra Pradesh* 1993 SCR (1) 594.

¹²¹ Government of India, 'Study On Copyright Piracy In India' (2011) *Ministry of Human Resource Development* available at: <http://www.education.nic.in/copyright/mainact.asp> (last accessed 27th February, 2014).

in all major instruments tasked with the global regulation of copyright.¹²²

9. UNDERSTANDING ACCESS TO KNOWLEDGE AND DISABILITY:

1.7. ACCESS TO KNOWLEDGE

Another important aspect that should be considered while broaching this delicate issue of copyright infringement is access to knowledge. It is impossible for people belonging to different socio-economic backgrounds to have similar access to books and knowledge. It is also not very prudent to expect everybody to be able to buy and utilise many books that seem to cost a fortune these days. This issue was addressed in the United States of America in the case of **Aaron Swartz**¹²³ who believed that locking up access to knowledge behind the barriers of money by powerful publishing companies and online databases was socially detrimental to the world. This profited only a few rich people and caused the entire world to lose out on vital knowledge and information. The authors did not profit from the activities of these copyright holders. They wanted their work to be accessed and used by students and other people for research purposes. They wanted to impart knowledge. He believed that access to knowledge should be free.

This is especially true in a developing country like India where the poverty rate is as high as 37%.¹²⁴ If one attempted to buy all the books, which are normally prescribed for any course, most of which are highly priced, it would mean that only very few privileged students would be able to afford an education in India. The facility of copying certain pages for educational purposes is necessary because purchasing individual books is expensive.

¹²² *Supra* Note 8.

¹²³ *United States v. Swartz*, 1:11-cr-10260, 106 (D. Mass. filed Jan 14, 2013).

¹²⁴ DP/INF/Summary.

1.8. DISABILITY

India is a developing nation and in the context of the same, if photocopying of expensive course books for educational purposes is not allowed then it will lead to disabling students from economically challenged backgrounds with regard to access to education.

India is a social welfare nation and keeping that in mind, it is the duty of the court to uphold the constitutional values of equality of opportunity. Not allowing students who cannot afford to buy the books to photocopy will lead to the creation of a barrier to education. This will ultimately lead to increasing the gap between the rich and poor. The rich will have access to the expensive books and will be in a better position to equip themselves with knowledge whereas the poor will continue to wallow in the mire. They will not have the means to access knowledge even if they are interested in further studies. It will destroy the ideals on which our constitution was created. Further, it will be a breach of section 52 (1) (zb) of the Copyright Act as a person who does not have the economic capability to buy expensive books will necessarily be disabled from accessing such books. Therefore, it will come within the ambit of section 51 (1) (zb).

At this point, it would be interesting to note that a frequently voiced criticism of the U.S. copyright system is that it enables persons claiming copyright interests to “over claim” – that is, to successfully assert rights over content, despite the fact that either the content at issue is not subject to copyright protection at all, perhaps because it has fallen into the public domain, or because it comprises non-copyrightable facts, ideas, scenes *A faire*, or *de minimis* fragments of expression, a specific use of that content is permissible under, for example, the fair use doctrine.¹²⁵

¹²⁵ Patricia Aufderheide & Peter Jaszi, ‘Media, Untold Stories: Creative Consequences of The Rights Clearance Culture for Documentary Filmmakers’ (2004) *Center for Social Media*, available at http://www.centerforsocialmedia.org/rock/backgrounddocs/printable_rightsreport.pdf (last accessed 27 February 2014); Marjorie Heins & Tricia Beckles, ‘Will Fair Use Survive?: Free Expression in the

10. ECONOMIC ANALYSIS OF THE PREVAILING SITUATION OF PRINT IMPAIRMENT IN INDIA

Education is regarded as the most effective vehicle of social and economic empowerment. Education, especially primary education is not just an inalienable human right, but a powerful instrument for generating benefits for individuals and their families, the societies in which they live, and future generations. Primary education is recognised as a basic human right across the world and is the most important step in educating a significant number of people as it is a prerequisite for higher levels of education. However, over the years, the quality of education has been on a steady downfall, and its economic returns have been on a constant downward spiral, especially in developing countries, where the dropout level has also been on an increase.¹²⁶ On a macroeconomic level, it is more than apparent that the economic development of a country plays an important role in the quality and quantity (number of years) of education an individual receives. Lesser-developed countries, where access to money, and by

Age of Copyright Control' (2005), *Brennan Center for Justice at NYU School of Law*, available at <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf> (last accessed 27 February 2014); Lawrence Lessig, *Free Culture: How Big Media Uses Technology and The Law to Lock Down Culture and Control Creativity*, The Penguin Press, New York, 2004; James Gibson, "Risk Aversion and Rights Accretion in Intellectual Property Law", *Yale Law Journal*, Vol. 116, No. 3, July-September 2007, p. at 883, pp. at 887-906; William F. Patty & Richard A. Posner, "Fair Use and Statutory Reform in the Wake of Eldred", *California Law Review*, 92 Vol. 92, No. 6, December 2004, p. 1639, pp. 1655-56; Christopher S. Yoo, "Copyright and Public Good Economics: A Misunderstood Relation", *University of Pennsylvania Law Review*, Vol. 115, No. 3, January-March 2007, p. 635; Christopher S. Yoo, 'Copyright and Product Differentiation', *N. Y. U Law Review*, Vol. 79 No. 1 April-June 2004 p. 212.

¹²⁶ Milan Thomas & Nicholas Burnett, 'Exclusion of Education: The Economic Cost of Out of School Children in Twenty Countries', *Educate A Child & Results for Development* available at: <http://r4d.org/sites/resultsfordevelopment.org/files/resources/Exclusion-from-Education-Final-Report.pdf> (last accessed 24th June 3014).

extension access to education is difficult are known to have compromised with the education of the citizens.

It is, therefore, crucial that educationally disabled and print impaired students in India be provided access to expensive textbooks and study material in order to ensure educational progress. Though fair dealing may be considered to have a significant restriction on the exclusive rights of the copyright owner, courts tend to interpret this by considering the economic impact it has on the copyright owner. While it is important to secure the economic profits of the author and the publisher, there is a greater social responsibility to ensure and secure education for the children of this great nation. If this situation is assessed from the macro level, we can see that there will be a huge economic loss to the country if students are denied access to education.¹²⁷

11. CONCLUSION

It is imperative that the judiciary interpret the 'Fair Use' doctrine liberally. It has been clearly mentioned that copyright legislations are welfare legislations¹²⁸ and the Copyright Act is trying to balance the needs of the society and the rights of the author. Essentially, it is doing the job of a funambulist. However, in the instant case the need of the society in educating their children is exponentially more important than the needs of publishers and authors to make profit. The judiciary must take care to ensure that education is not monopolised by publishers driven by profit motive and that it is accessible to all who want to study. Education must not be allowed to be made the prerogative of the elite section of society and to do that, the scope of Fair Use and the Educational Exception should be widened to allow photocopying of copyrighted material for use by the students. There should not be a cap on the amount of material photocopied, and the students should be free to photocopy any book assigned by the teacher to further their education. Without access to expensive books, the loss will not be only for the student but it will be a loss for the nation as a whole. The future of our country will be undermined as a large section

¹²⁷ *Ibid.*

¹²⁸ *Supra* Note 22.

of our society will be unable to cultivate their minds and further, the social welfare objective of both the copyright legislation and the preamble of our constitution will be defeated.