

103, and 112 to perform. This has resulted into an obscurity between patentability and patent-eligibility.

It can also be concluded that the judgment may dissuade research by not providing incentives to development or increment over known drugs. However, howsoever divided the opinions on Mayo may be, it's undisputed that it stands as the current view on the §101 patent-eligibility requirements.

DILEMMA OVER PHOTOCOPYING OF COPYRIGHTED MATERIAL: IN LIGHT OF DELHI UNIVERSITY'S ON-GOING LITIGATION.

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ABSTRACT

This paper seeks to explore how the rampant photocopying of copyrighted material with advances in copying technology have generated a critical need for the establishment of systems that will enable users to lawfully use copyrighted works. While on one hand, the objective of copyright is to give reward to the labour of authors, on the other it is also to promote educational progress. For such promotion, one of the exceptions existing in our copyright law is in the nature of fair dealing. Even after decades of debate and confrontation, a conflict exists between the aforementioned two objectives. The on-going litigation in Delhi High Court between a group of renowned publishers and photocopying shops has again ignited the same debate regarding inclination of copyright laws. The question remains -whether copyright law is inclined to protect the interest of the user or does it lean more towards the interest of the publisher? Is this on-going litigation a case of copyright aggression? Or, is it a case where the rights of the publisher are really hampered.

This paper aims to strike a balance between copyrighted owner and users of the said material. By highlighting the economic impact of photocopying on the right holders, photocopying to a certain extent (i.e. within the realm of fair dealing) has been portrayed in good light. The work of various stakeholders, i.e. the publishers, teachers and students is at stake due to such litigation and the question that keeps reverting to all the stakeholders is that 'how much photocopying of a book is too much' or to put it simply, what should be the 'threshold level?'. The objective of this paper is to provide cogent solutions to

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this dilemma. Reprographic Rights Organization (RRO), which acts as an intermediary between the owner and the users should be designed more efficiently so as to find a middle path. If educational photocopying crosses the threshold level as permitted under fair dealing, then RRO can intervene and collect remuneration from such unauthorized photocopying and give it to the owner in form of royalty. By such royalty, the publisher or the owner will have no issues even if photocopying is beyond the realm of fair dealing.

1. INTRODUCTORY OVERVIEW

It has become dramatically easier to make copies of printed material since the introduction of the Xerox copier in 1954. Copyright owners are alarmed by the growth of technology that eases the task of copying these properties. A need to come with appropriate legal solutions pertaining to mounting levels of unauthorized photocopying and turning it into a lawful activity by restriction of access to users and remunerations to authors and publishers has been in debate since late 1960s.⁴⁰⁹ The on-going litigation in the Delhi High Court between a group of leading publishers and a small photocopy shop named Rameswari photocopy service attached to Delhi University has generated enormous public debate regarding the extent to which user can photocopy the work of a copyright owner. The issue at hand is that Rameswari Photocopy Service attached to Delhi University regularly compiles extracts from copyrighted books and makes it available to students in form of a course pack. Subsequent to this, a group of publishers have sued this Photocopy Service for copyright infringement of their works. Hence, the dispute is whether such photocopying of copyrighted material is prejudicial to the interest of the publication house/author or is against the larger public interest which is at the very heart of our constitutional guarantee i.e. fundamental right to education for all, which the copyright law seeks to achieve.

Photocopying of copyrighted material takes place everywhere in society and if photocopying is left ungoverned and reproduction of copyrighted material takes place without the consent of publisher⁴¹⁰, it will be prejudicial to the interest of those all involved in publishing and printing of copyrighted material. However it is impossible to ask permission to photocopy the material directly from publishers from all

⁴⁰⁹ [Tseng, Henry P., 'Ethical aspects of photocopying as they pertain to the library, the user and the owner of copyright', 72 *Law Library Journal*.](#) 86 (1979), available at <http://heinonline.org/HOI/LandingPage?handle=hein.journals/llj72&div=16&id=&page=> (Last accessed on 10 May, 2014).

⁴¹⁰ [Shafer, Robert L., "Photocopy industry and copyright: section 108 of the bill", *The Journal of Law and Technology*, Vol. 4, No. 35, 1975.](#)

over the world. Then, the highly pertinent question arises- How do we regulate this rampant photocopying of copyrighted material? The answer to this question is what the paper seeks to achieve.

The idea of this paper is to highlight the role which can be played by the RRO in creating a regime where educational photocopying will be allowed even if it goes beyond the realm of fair dealing. In order to ensure that the rights of the owner are not compromised, RRO will collect remuneration from user on such photocopying which is beyond the realm of fair dealing. In this way, the conflict between author's monopoly and the user rights will be resolved.

To maintain coherence, this paper has been segmented into five parts. Part I will give an overview about the aspect of right to photocopy under Copyright Law. The economic analysis pertaining to photocopying in Copyright law is one of the focuses of this part. Judgments regarding right to photocopy across the globe will be covered in Part II of the paper. Part III of the paper would throw light on legislative context of fair dealing in Indian Copyright law regarding photocopying for education purpose. After providing this legislative angle to photocopying, Part IV will, by illustrating the nexus between public interest and copyright law, provide a justification for photocopying of copyrighted material for educational purposes. The importance of Copyright Law in promoting right to education has been dealt with in this part. In lieu of the objective set to be achieved by the paper i.e. working toward attaining copyright balance—where the interests of users, creators, owners and the general public are considered— potential solutions will be advanced in Part V of the paper. One of the solutions depicted will be in the form of strengthening the Reprographic Right Organization (RRO). The RRO was created with an aim to protect the creative works of rights holders. If regulated properly, a robust and powerhouse RRO will tackle the mentioned problem and will act as a bridge between the owner and copyright user.

2. OVERVIEW OF COPYRIGHT LAW VIS-À-VIS RIGHT TO PHOTOCOPY

Copyright law is often deemed to be taken as a balance between the rights conferred to copyright owners and the rights granted to the

users of copyrighted materials.⁴¹¹ One of the most important counterbalances to the rights granted to owners of the copyrighted material and the right guaranteed to the copyright's users is to make "fair dealing" of copyrighted material. Fair dealing is a defence to a claim of infringement provided in legislation of various countries when the copying is done for purposes such as research, teaching, news reporting and the like. The right of fair dealing shields the public from the copyright monopoly, which at times becomes so expansive that it obstructs the very progress of learning and knowledge. Copyright law is, in fact, constitutionally mandated to promote this very knowledge acquisition and learning.⁴¹²

Although copyright's fair dealing doctrine has long been targeted by criticism and complaint, in recent years critics have further raised their voices and have become more insistent. In particular, they have expressed dissatisfaction with the doctrine's ambiguity in implementation. While acknowledging that the flexibility of doctrine of fair dealing serves the purpose of courts by allowing and adapting the doctrine to new circumstances, critics are also increasingly concerned about the price and repercussions of this flexibility. It is widely believed that an ambiguity exists for those who would bank upon the doctrine of fair dealing. This ambiguity has become more disturbing as digital technology has expanded the ambit of potential uses of copyrighted works.

The fair dealing reform is in the air and the application of fair dealing pertaining to photocopy of copyrighted material is not settled despite

⁴¹¹*Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (3d Cir. 1975) (citing Lord Mansfield: "[We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.]

⁴¹² Lydia Pallas Loren, "Redefining the market failure approach to fair dealing in an era of copyright permission systems", *Journal of Intellectual Property Law*, Vol. 5, No. 1, 1997.

decades of deliberation and litigation.⁴¹³ Hence, the demand is great among courts and scholars for a clear and comprehensible approach to fair dealing. As article 9⁴¹⁴ of the Berne convention and article 13⁴¹⁵ of the TRIPS prohibit the reproduction of author's work, certain exceptions can be made as regards reproduction of work but it should not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author. The secretariats of the permanent committee and intergovernmental copyright committee of the Berne union prepared a report in 1965⁴¹⁶ which suggested that reprographic reproduction without the permission of copyright owner should be allowed only for private, personal, non-commercial or similar purposes, for the use of educational purpose and establishment, for research or for the dissemination and preservation of culture by libraries.⁴¹⁷ As per the Berne convention, exceptions are allowed to be made in three cases⁴¹⁸ (a) in certain special cases, where the reproduction (b) does not conflict with the normal exploitation of the work and (c) does not unreasonably prejudice the legitimate interests of the author, are known as the Berne "3-step" test.⁴¹⁹ This test provides us a path forward to resolve the conflict between copyright owner and user, by laying down the the scope of permissible exceptions and limitations. In fact, this test is a general formula for determining the legality of countries' exceptions and limitations to copyright. Photocopying of

⁴¹³ Stephen M. McJohn, "Fair dealing and Privatization in Copyright", *San Diego Law Review* Vol.35 No. 61, 1998.

⁴¹⁴ *Berne Convention*, (Came into force and adopted 1886), art. 9

⁴¹⁵ *Trade Related Aspects of Intellectual Property Rights, 1995*, art. 19.

⁴¹⁶Berne Permanent committee and intergovernmental copyright committee available at <http://unesdoc.unesco.org/images/0006/000659/065998eb.pdf> (last accessed on 10 May, 2014).

⁴¹⁷ The Photographic Reproduction of Protected Works by or on behalf of Libraries, Documentation Centres and Scientific Institutions, 19 UNESCO COPYRIGHT BULL. 63-89 (1966).

⁴¹⁸N. Caddick, QC, G. Davies and G. Harbottle, *Copinger And Skone James on Copyright*, Thomson sweet & Maxwell, Vol. 1, London, 2013.

⁴¹⁹ *Id.*

copyrighted material within the realm of fair dealing will indeed qualify the above mentioned tests.

3. POTENTIAL ECONOMIC IMPACTS OF PHOTOCOPYING ON REVENUE OF COPYRIGHT OWNER

Unlike trademark and patent law, a copyright provides protection only against copying; unintended re-creation of copyrighted work is not actionable. While at policy level, it is generally assumed that unauthorized copying must be harmful to copyright owners, as per mauthors' understanding unauthorized photocopying of any copyright work to a certain extent (i.e. within the realm of fair dealing) will have no adverse impact on the revenue of the right holders. The elusive, judicial doctrine of 'fair use', allows a reasonable portion of a copyrighted work to be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner's market for his work.⁴²⁰ What, however, is a 'reasonable portion?' And, when is a purpose "not competitive with copyright owner's market"?

The right holders see photocopying of their product as an infringement of their property rights and, more importantly, as a drain of demand and revenues. However, this issue of photocopying has two other important effects, which are generally not acknowledged: (1) Because the materials can be inexpensively copied, there is an increased demand for them as against copyable originals (i.e., the demand of copiers can be indirectly appropriated by copyright owners), and (2) the total value of the copyrighted good may be dramatically altered.⁴²¹ Because of these two effects, photocopying need not always have a detrimental impact on the revenues of copyright holders. The debate between owners and users of copyrighted materials pertaining to revenue may be misplaced.

⁴²⁰ Ruth Towse and Rudi Holzhauser, *The Economics of Intellectual Property*, Edward Elgar Publishing Limited, UK, 2002.

A. ⁴²¹ William M. Landes and The Honorable Richard A. Posner, *The Economic Structure of Intellectual Property Law*, Belknap Press, UK, 2003.

Copyright is only one of the several methods whereby authors or publishers can appropriate revenue from those who use intellectual property. The other potential form appropriation concerns the ability of authors to appropriate revenues indirectly from users who do not directly pay the authors for the right to use their creation. The profits of copyright holder are threatened when his ability to appropriate revenues is reduced. The substitution for copying for purchase has generally been viewed as decreasing the potential ability to appropriate, as held by copyright owners.⁴²² Yet it is certainly not the case that direct payment need to be made to sellers of products in order for them to appropriate revenue from users. The copyright owner sells a certain number of authorized copies, from which unauthorized copies are made. The users of unauthorized copies may be indirectly paying the copyright owner for their unauthorized copies if the owners of authorized copies take the “resale” value of the authorized copies into account when they purchase them.⁴²³ Therefore, it is incorrect to conclude that miniscule level of unauthorized copying will have a detrimental impact on the revenue of the owner.

4. FAIR USE UNDER THE COPYRIGHT LAW OF THE UNITED STATES OF AMERICA

As per section 107⁴²⁴ of the U.S Copyright Act, in determining whether the use made of a work in any particular case is a fair use, certain factors are considered.⁴²⁵ The consideration includes “purpose and character of the use” which means whether such use is of a commercial nature or non-commercial nature i.e. for non-profit educational purposes,⁴²⁶ and “the consequences of the use upon the potential market of the copyrighted work which means the gravity in which the use may affect the sale, or lessen the profit, or surpass the objects of the original work.”⁴²⁷ When the Copyright Act of 1957 was

⁴²² *Id.*

⁴²³ *Supra* note 12.

⁴²⁴ *U.S. Copyright Act*, 1976, s. 107.

⁴²⁵ Harry N. Rosenfield, “Customary use as “fair dealing” in copyright law”, *Buff. Law Review*. Vol.25 No. 119, 1975.

⁴²⁶ *Supra* note 10.

⁴²⁷ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

enacted, it made the rights of copyright owners "subject to" the rights of fair dealings. It judicially codified the doctrine of fair dealing as a right that is against the rights granted to copyright owners."⁴²⁸ But unlike the position in the United States, there is no statutory criteria of "fairness" under the United Kingdom and India copyrighted law and since a long time, an objective test is applied in order to determine the fairness; it is adjudged by the objective standard of whether a honest and fair-minded individual would have dealt with the copyrighted work of the author in the manner in which the defendant did, for the relevant purposes.⁴²⁹

Our Judiciary has relied on such objective test, to determine the legality of any use of a copyright work. With the advancement of technology, the judiciary in USA has had the occasion to address the issues related to various facets of fair dealing in some detail. In recent years, India has seen tremendous technological advancement; however we have witnessed limited exposure to fair dealing issues. Our High Court has got the opportunity to deal extensively with the principles of fair dealing in the on-going litigation, by settling the dispute between the copyright owner and user.

5. FAIR DEALING UNDER THE COPYRIGHT LAW OF CANADA

Canadian copyright law follows the fair dealing doctrine. The Canadian Copyright Act was introduced for the first time in 1921. In 2004, the Supreme Court of Canada in *CCH Canadian Ltd v. Law Society of Upper Canada*⁴³⁰ established criteria to adjudge the doctrine of fair dealing. A two-step test was set up:⁴³¹ In this case it was laid down that the 1st step would be to determine whether the copyrighted work is

⁴²⁸ *Id.*

⁴²⁹ *Hyde Park Residence Ltd. v. Yelland* [2001] Ch. 143 [1999] R.P.C. 655; *Newspaper Licensing Agency Ltd. v. Marks and Spencer plc* [2001] Ch. 257 [2001] R.P.C. 76.

⁴³⁰ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

⁴³¹ [Blackwell, Thomas E.](#), "[Law of copyright and the fair dealing doctrine](#)", *J.C. & U.L.* Vol.1 No. 222 1974.

being used for the purpose of private study, research, education etcetera; then the second step is taken up.⁴³² The 2nd step would be to check the (1) Purpose – Commercial Purpose or Non-commercial Purpose, (2) Character i.e. Plan to make a single copy or multiple copies or will the copy be destroyed after the use? (3) Amount - Examine the amount and significance of copied portion, (4) Alternatives - Is a non-copyrighted equivalent available? (5) Nature: Is the work private, confidential? Unpublished? If unpublished seen as more 'fair' since copyright has a goal of dissemination, (6) Effect i.e. affecting the potential market of copyrighted work.

These steps are akin to the criteria stated in Section 107 of U.S Copyright Act. The difference being that in the USA, the condition to deal with fair dealing has been statutorily codified whereas in Canada, the condition has been laid down by the judiciary. Going by these conditions, one may say that educational photocopying is permitted but once it goes against the realm of fair dealing then the real conflict arises between the copyright owner and the user.

6. ANALYSIS OF CASES VIS-À-VIS RIGHT TO PHOTOCOPY

At this juncture, the cases across various jurisdictions pertaining to educational photocopy will be critically analysed. The opinion expressed by each of the court is of immense importance since it will provide a comprehensive view of the judicial treatment of fair dealing in relation to right to photocopy.

Twentieth Century Music Corp. v. Aiken⁴³³

In this case, the Court expressed that the public need is the primary purpose and object behind copyright, that purpose can be achieved by securing for the copyright owner "a fair return for an author's creative labour".⁴³⁴ But the ultimate public aim is to encourage artistic creativity

⁴³² *Id.*

⁴³³ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151.

⁴³⁴ *Id.*

for the public good. The court laid down the following points in order to deal with the fair dealing in relation to research:⁴³⁵

- 1- There must be fair dealing;
- 2- The research must be non-commercial
- 3- The use must be for the purpose of research;
- 4- Sufficient acknowledgment must be given to the source of the material which has been used.

Basic Books, Inc. v. Kinko's Graphic Corp⁴³⁶

In this case, Kinko's was held to be liable for infringement of copyrighted work when it photocopied book chapters for selling to students as "course packs" for their university classes.⁴³⁷

Purpose: The copying was not for education purpose but for commercial purposes, hence this purpose weighed against the fair dealing.⁴³⁸

Nature: Most of the works were factual i.e. pertaining to history, sociology etc.—hence, this factor weighed in favour of fair dealing.⁴³⁹

Amount: Percentage of copied portion was analysed by the court, and it was found that copying of 25 percent of the original full book was excessive, because the copied portions were substantial and each of the chapters of the book could stand alone.

⁴³⁵Paul Torremans, *Holyoak & Torremans Intellectual Property Law*, Oxford University Press, London, 2010.

⁴³⁶ *Basic Books, Inc. v. Kinko's Graphic Corp.*, 758 F. Supp. 1522.

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.*

Effect: It was found by the court that it would directly affect the market of the books, because the course packs assigned for the students competed directly with the potential sales of the original books.⁴⁴⁰

Conclusion: Three out of the four factors were against fair dealing hence the court specifically found that all course packs are infringements.⁴⁴¹

Princeton University Press v. Michigan Document Services, Inc.⁴⁴²

In this case, a private copy shop sold “course packs” under circumstances very much similar to the Kinko’s case. In this case also, court came to the conclusion that the photocopy shop have acted outside the ambit of fair dealing.⁴⁴³

Purpose: The fact that the use was commercial- This factor to weigh against fair dealing.

Nature: In this case they were non-fiction materials but copied portions contained some degree of creative expression, which is leaning against fair dealing.

Amount: Defendant used between 30 percent of each work. This factor went against fair dealing.

Effect: In this case, the court gave emphasis on the affect of photocopy on the market of copyrighted material. The court found that potential licensing opportunities existed for all copied works, and it was also found that the other commercial copy shops have routinely

⁴⁴⁰ *Id.*

⁴⁴¹ *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996)

⁴⁴² *Id.*

⁴⁴³ *Id.*

requested permission to reproduce copyrighted works. Such licensing system was weighed heavily against fair dealing.⁴⁴⁴

Conclusion: This case was by heard by 13 judges of the court of appeals for the sixth circuit, out of 13, 8 judges rules against the fair dealing and 5 judges ruled that copying was fair dealing. Court rules that such photocopying by a commercial copy shop does not constitute fair dealing. Court rules that obtain permission through licensing system was simple in this case and held that there was a way to pay for the use but the defendant did not pay the licensee fee and because of this the plaintiff suffered market harm.⁴⁴⁵

Significance of the Case: Under this market failure view of fair dealing, if an owner of copyrighted material can establish a "permission system" to collect licensee fees for a certain kind of use, then the copyright owner will be able to overpower a claim of fair dealing.⁴⁴⁶ Hence, this market failure has the potential to allow owners of copyright to guard *all* uses of their works which can result in elimination of the necessary "breathing space" in copyright law.⁴⁴⁷ In this case, Court under the 1st factor applies a presumption of unfairness for commercial uses: i.e. if a copying of work is found to be commercial, the use is said to be presumptively unfair.⁴⁴⁸

American Geophysical Union v. Texaco Inc.,⁴⁴⁹

In this case, the court held that photocopying of individual journal articles by a Texaco scientist for their professional research needs was not fair dealing.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ Lydia Pallas Loren, "Redefining the market failure approach to fair dealing in an era of copyright permission systems", *Journal of Intellectual Property Law.*, Vol. 5, No.1, 1998.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Los Angeles News Serv. v. Tullio*, 973 F.2d 791, 798, 24 U.S.P.Q. 2d (BNA) 1026, 1033 (9th Cir. 1992).

⁴⁴⁹ *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

Purpose: A research purpose generally favours fair dealing but in this case Texaco's research was for commercial gain, and the use of copyrighted work substituted an additional subscriptions. Therefore, this factor went against fair dealing.⁴⁵⁰

Nature: In this case, the articles were factual - went in favour of fair dealing.

Amount: Here, an article was photocopied which is an independent work, so copying of the article means reproduction of a copyrighted entirely which is against the fair dealing.

Effect: The court had found that Texaco reasonably could have purchased more subscriptions of the relevant journals. Hence the photocopying directly affected the market of the copyrighted work, hence this factor weighed against fair dealing.

Conclusion: The court found that the Copyright Clearance Centre provided the mechanism for paying licensee's fees and securing permissions. Hence court found that 3 out of 4 factors weighing against the fair dealing in the corporate sector.⁴⁵¹ The Second Circuit amended its decision applies to "institutional copying and its application was on private companies and that the ruling does not reach isolated copying by independent researchers."⁴⁵²

7. RIGHT TO PHOTOCOPY FOR EDUCATIONAL PURPOSES UNDER INDIAN COPYRIGHT ACT, 1957

The Indian Copyright Act follows the notion of fair dealing. The word 'fair dealing' has not been defined under the Indian Copyright law. The Indian judiciary has on numerous occasions referred to the English case of *Hubbard v Vosper*⁴⁵³ on this matter. The following words of Lord Denning provide a pathway to understand the concept of fair dealing:

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *Hubbard v. Vosper*, (1972) 1 All ER 1023.

“It is impossible to define what is "fair dealing". It must be a question of degree. You must first consider the number and extent of the quotations and extracts... then you must consider the use made of them....Next, you must consider the proportions...other considerations may come into mind also. But, after all is said.... it is a matter of impression”

Section 52 of the Copyright Act, 1957 lays down the ground on which an exception to copyright infringement can be provided. This section provides an exhaustive list and any use not falling within the statutory list is considered as an act of infringement.⁴⁵⁴ The judiciary in our country has from time and again reiterated that it is impossible to develop a ‘rule of thumb’ for cases of fair dealing as each case depends upon its own facts and circumstances.⁴⁵⁵ Under the Indian Copyright Act, there are only three sections dealing with fair dealing in an educational context i.e. 52(1)(a)(i), 52(1)(g) and 52(1)(h). 52(1)(g) provides that the *bona fide* publication of a non-copyrighted work in a collection intended for the use of educational institution would not amount to an infringement of copyright. Section 52(1) (h) of the Copyright Law, 1957 further provides that any reproduction of a literary, musical or artistic work by the teacher or pupil in the course of instruction or in answer to question asked in examination shall not amount to an infringement of copyright.⁴⁵⁶ 52(1) (a) (i) provides with a fair dealing of literary, dramatic, musical or artistic work for private use including research. The above mentioned provisions will lead us to conclude that there is no particular provision in our Act dealing with the issue of photocopying of copyrighted work for educational purposes. However, the right to photocopy will undoubtedly arise from the plain interpretation of the relevant clause of Section 52. The

⁴⁵⁴*Blackwood and Sons Ltd and Others v AN Parasuram and Ors.*, AIR 1959 Mad 410 Para 84. Also see, Vaibhavi Pandey, India: ‘Fair Dealing In Copyrights : Is The Indian Law Competent Enough To Meet The Current Challenges?’, Singh & Associates, 13 March, 2014, at <http://www.mondaq.com/india/x/299252/Copyright/Fair+Dealing+In+Copyrights+Is+The+Indian+Law+Competent+Enough+To+Meet+The+Current+Challenges> (last accessed on May 10, 2014)

⁴⁵⁵*ESPN Stars Sports v. Global Broadcast News Ltd and Ors*, 2008 (36) PTC 492(Del).

⁴⁵⁶ *Copyright Act, 1957*, s. 52(1) (h).

photocopy will fall under Section 52(1)(i), which mentions about reproduction of any work by a teacher or a pupil in course of instruction.⁴⁵⁷

Fair dealing cases had been rare in India until the recent decades which, even then, generated only a handful of cases. As stated earlier, unlike the American four factor test, our Copyright Law does not contain any list to determine the ‘fairness’. In US, it has being held that these four factors should not be dealt in isolation in each other. In the case of *Campbell v Accuff-Rose Music*⁴⁵⁸, it was held that all the four factors are to be explored and weighed together, in light of the copyright’s purposes of promoting educational welfare. Also, these factors have been perceived as non-exhaustive.⁴⁵⁹ However, Indian Courts while applying these factors have adopted an inconsistent and fractured approach, for instance applying a particular factor in isolation with other factors.⁴⁶⁰ In fact, the Calcutta High Court, in *Barbara Taylor Bradford v Sahara Media Entertainment Ltd*, has conceded to the fact that there is dearth of judicial jurisprudence on copyright matters. Our courts, rather than limiting itself to these factors, should seek to build on the distinctive characteristic of its fair dealing regime. It should introduce new grounds which shall bring the element of flexibility in Indian Copyright law.

The on-going litigation in the Delhi High Court should be resolved by the Courts by applying its own grounds rather than borrowing the US ‘factor analysis method’, thereby creating a new regime of fair dealing. The court in this on-going Delhi university litigation, can define the role of fair dealing in the scheme of copyright law, especially with respect the issue of photocopying. Educational photocopying under the umbrella of fair dealing is no doubt a necessity. However, the delineation of the role of fair dealing in the overall scheme of the copyright law is the need of the hour. Precisely, the Indian copyright jurisprudence is awaiting its equivalent of *Folsom v Marsh*⁴⁶¹, which will

⁴⁵⁷ *Copyright Act, 1957*, s. 52(1) (i).

⁴⁵⁸ *Campbell v. Accuff-Rose Music* 510 US 569(1994), pp. 577-78.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Supra* Note 10.

⁴⁶¹ *Folsom v. Marsh*, 9. F.Cas. 342 (C.C.D. Mass. 1841).

address to the basic issues of the purpose, meaning and boundaries of fair dealing in Indian copyright law. This on-going Delhi university litigation can be our 'Folsom v Marsh', since it deals with issue which has remained unresolved for several years in India.

8. RATIONALE BEHIND THE INSERTION OF FAIR DEALING IN INDIAN COPYRIGHT ACT

The rationale behind the insertion of fair dealing clause in our legislature was to balance the public interest against the exclusive rights of the authors. Educational photocopying promotes education which is termed as "nation's paramount public interest".⁴⁶² Keeping the fundamental goals of copyright in mind, educational uses of copyrighted material serves an important public function. In fact, the Supreme Court in the case of *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and Ors*⁴⁶³ have laid down the foundation for the fundamental rights to education.⁴⁶⁴ One of the challenges India faces in the educational sector is the cost of the reading material and the Indian copyright law has a vital role to play in overcoming this challenge. Contrary to the popular perception, the cost of the books in

⁴⁶² Lawrence Liang, "Exception and Limitation in Indian Copyright Law for Education: An Assessment", *The Law and Development Review* Volume 3, No. 2, 2010.

⁴⁶³ *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and Ors* [1981] AIR 746.

⁴⁶⁴The Supreme Court in this case stated: "The right to life enshrined in Article 21...means something much more than just physical survival. Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiori, this would include the faculties of thinking and feeling. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms." The Court's list of rights that attend the right to life do not explicitly include education, but quite clearly, as the emphasized phrases above suggest, implicate the right to adequate education.

India is not comparatively cheaper than other countries.⁴⁶⁵ Keeping this background in mind, educational photocopying has an important role to play. One of the most important ways of promoting access in the area of education is by ensuring that copyright laws have strong exceptions and limitations that enable the fair dealing of material for educational purposes.⁴⁶⁶ Educational uses of copyright material are part of public interest and photocopying falls within this aspect. This photocopying disseminates information, which in many cases is unavailable to scholars and students, due to the high price of the books. By allowing this educational photocopying, the copyright law will fulfil one of its primary goals of access to knowledge and cultural progress.

The authors' viewpoint is that the copyright defences are sufficient to cover the creation and reproduction of copyrighted books and material in the nature of educational photocopying. USA, where copyright jurisprudence has progressed a lot, has gone through the same phase of debate between public interest and exclusive rights of the owner and now the matter has taken a rest. Naturally, USA has guidelines pertaining to educational photocopying.⁴⁶⁷ In fact, this is not only limited to USA and many jurisdictions across the globe have developed their guidelines regarding this subject matter.⁴⁶⁸ The photocopying guidelines in India are yet to crystallize in some concrete form;the

⁴⁶⁵Rebecca Tushnet, 'Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It' , 114 Yale L.J. 535-590 (2004), at <http://scholarship.law.georgetown.edu/facpub/797/> (last accessed on 10 May, 2014)

⁴⁶⁶P. B. Hugenoltz and R.L. Okediji, 'Conceiving an International Instrument on Limitations and Exception to Copyright: Final Report' (March 06, 2008), available at www.ivir.nl/.../hugenoltz/limitations_exceptions_copyright.pdf (last accessed on 10 May, 2014).

⁴⁶⁷ Stephen M. Mcjohn, 'Fair Use and Privatization in Copyright?' *San Diego Law Rev. Vol. 35 No. 61*, 1998.

⁴⁶⁸ Paul Goldstein, 'Fair Use in a Changing World', 50 *Journal of the Copyright Society of the U.S.A.* 133-48 (2003), at <https://www.law.stanford.edu/publications/fair-use-in-a-changing-world> (last accessed on 10 May, 2014).

reason being that the threshold level is yet to be defined either by the legislature or by the judiciary. The RRO Rights organization, which acts as intermediaries between the copyright owner and the user can act as a trouble-shooter in this regard. Apart from defining such threshold level, this organization should come into picture whenever any photocopying is done, which is not covered within the ambit of fair dealing. Eventually, by such intervention, a system will be created which will enable the user to copy lawfully from copyrighted works, even if it goes outside the realm of fair dealing.

9. ROLE PLAYED BY REPROGRAPHIC RIGHTS ORGANIZATION

The main function of Reprographic Rights Organization (RROs) is to act as representatives of authors and publishers worldwide and to serve rights holders, users and society. Authors and publishers all over the world are committed to free access to information, but this must not be confused with free flow of information.⁴⁶⁹ As demonstrated earlier, photocopying is an exception provided fair dealing is proved. The photocopying service is entrusted with profit while photocopying such material. The profit derived from photocopying of copyrighted material which is beyond fair dealing if shared with the publishers will solve the problem existing between the publisher and the photocopy shop, in the on-going Delhi university litigation.

For reproduction of any copyrighted work, RRO as acts as an intermediary between the publishers and users of copyrighted work for decades in many countries. Any right to reproduction of the work is

469 Vnzoma, *'To Photocopy or Not to Photocopy: The Role of the Reproduction Rights Society in Kenya*, (10 April, 2013), available at <http://cipitlawstrath.wordpress.com/2013/04/10/to-photocopy-or-not-to-photocopy-the-role-of-the-reproduction-rights-society-in-kenya/> (last accessed on 10 May, 2014).

exclusively with the owner of the copyright.⁴⁷⁰ Pragmatically, it is impossible to defend certain types of use; for example, not capable to supervise the uses of his work.⁴⁷¹ In this regard, RRO can bridge the gap between the individual and the users in these key areas. RRO was established to facilitate the necessary copyright clearance between the users and owner of copyrighted material.⁴⁷² Following is a general summary of tasks of any collective management organisation, including RROs

- 1- To keep eyes on when, where and by whom, copyrighted works are being used;
- 2- Bargaining with users or their representatives
- 3- Issuing licenses against appropriate remuneration and under reasonable conditions;
- 4- Collecting remuneration;
- 5- Distribution it to rights holders.⁴⁷³

Indian Reprographic Rights Organisation (IRRO) was established in the year 2000 and has been given statutory registration by the HRD ministry in 2002 to carry out and supervise the business of reprographic rights in the field of literary works.⁴⁷⁴ Unfortunately, the

⁴⁷⁰ *The Copyright Act, 1957*, s. 14.

⁴⁷¹ [Barnum, Deborah](#) , “[Law firm library photocopying and the myth of the fair dealing excuse](#)”, *Vt. B.J. & L. Dig.* Vo. 19, No. 35, 1993.

⁴⁷² Collective Management in Reprography presented by WIPO and IFRRO, *available at* http://www.wipo.int/export/sites/www/freepublications/en/copyright/924/wipo_pub_924.pdf (last accessed on 10 May, 2014).

⁴⁷³ *Supra* note 10

⁴⁷⁴ International Federation of Reproduction Rights Organization, ‘Copyright levies and Reprography, International Federation of Reproduction Rights Organization’ *at* http://www.ifrro.org/sites/default/files/Ifirro-Levy_Publication-9.pdf (last accessed on 10 May, 2014).

IRRO in India has not been able to prove its existence and in 2013, the Government of India refused to re-register IRRO.⁴⁷⁵ Though it still carries the function of Reprographic Rights organization, but a statutory recognition will give more teeth to this organization. The publishers in the Delhi university on-going litigation has recognized that a license from the IRRO to the user (in this case Rameshwari photocopying services) will cure the entire problem⁴⁷⁶ However, as of now, IRRO has failed significantly. The publishers who are members of this organization are not known and the works which are authorized by the owner are not provided in their website.⁴⁷⁷ Recently, the Govt of India refused to re-register [IRRO](#). The need of the hour is to bring an institutional and foundational change in the functioning of Indian IRRO. The next limb of the paper will throw some light on the role which can be played by an Ideal RRO.

9.1. HOW SHOULD AN IDEAL REPROGRAPHIC RIGHT ORGANIZATION WORK?

Licensing By RRO

RRO gives licenses to copy copyrighted material on behalf of owners of copyrighted material in order to act on their behalf.⁴⁷⁸ In this case, RROs get licensing authority from all right holders through an agreement. RRO can only give license of those publishers' work that have given mandate to act on their behalf.⁴⁷⁹ Hence, it is beneficial for the RRO to have as many publishers as their members, to achieve standardization. For instance, in the United States of America, copyright clearance centre got mandates from over 10,000

⁴⁷⁵Shamnad Basheer, *Breaking News: IRRO Registration Refused*, (December 9, 2013), at <http://spicyip.com/2013/12/breaking-news-irro-registration-refused.html> (Accessed on 10 May, 2014).

⁴⁷⁶ *Id.*

⁴⁷⁷ See the website of Indian reprographic rights organization, at http://irro.org.in/?page_id=6 (Accessed on 10 May, 2014).

⁴⁷⁸ WIPO, WIPO Guide on the Licensing of Copyright and Related Rights (2005).

⁴⁷⁹ [Reitz, Norman E.](#), “[Williams & wilkins: the impact of technology on copyright](#)”, *L.A. B. Bull.* Vol. 48, No.445 1972.

publishers.⁴⁸⁰ Two main types of licensing which are prevailing in the world are

- 1- Blanket licensing –In this licensing system, permission is given to the user photocopy from any publication within the limits of the agreement. This method is commonly employed in photocopying licenses that cover large sectors.⁴⁸¹
- 2- Transactional Licensing – Permission is given to photocopy certain defined work. This method is mostly used in licensing course-packs and other similar compilations.

Remuneration by RRO

RRO collects remuneration through licensee fee and distribute equitable remuneration or fair compensation to the right holders.⁴⁸² For example, in the Netherlands, institutions working in public interest (like educational institutions) are able to photocopy for students provided fair compensation is paid to the national reproduction right organisation and the reproduction fee is set by the statute.⁴⁸³ But in Belgium, all legal persons and natural persons who are involved in work of copying have to pay remuneration in proportion to the photocopies made of copyrighted material. These are mostly copy shops, schools, enterprises etcetera.⁴⁸⁴

Monitoring the Use of Works

⁴⁸⁰ [Kallinikou, Dionysia](#), “[Balance of copyright](#)”, *RHDI* Vo. 63 No. 265 (2010).

⁴⁸¹ [Schwartz, Mortimer D.](#); Hogan, John C., “[Copyright law and the academic community: issues affecting teachers, researches, students, and libraries](#)”, *U.C. Davis L. Rev.* Vol. 17, No.2 1983.

⁴⁸² *Id.*

⁴⁸³ Report of the Copyright Law Committee on Reprographic Reproduction, Australia Govt. Service (1976).

⁴⁸⁴ *Id.*

RRO should monitor the market to know which work and where, when and by whom it is being used. This information is necessary to collect and distribute the remuneration.⁴⁸⁵

Distribution of Remuneration

In this regard, RRO should maintain sufficient accuracy in order to provide maximum remuneration to the right holders. Structure of tariff can be price per page or price per student/employees. Tariff is subjective as it depends normally on the category of users, such a business use, education use etc.⁴⁸⁶ There are many systems to determine remuneration to the owner. In some systems, the rates are determined by means of negotiations between groups of users and rights holders. In some jurisdiction, the executives' authorities take a final call in fixing the rates, after hearing the exploiting users and rights-holders⁴⁸⁷. In some jurisdictions, quasi-judicial authorities fix the rate without the involvement of the parties. Under European jurisdiction, the rates are fixed by negotiation with collecting societies; however this is subject to judicial review.⁴⁸⁸ In case of photocopying, the best way to calculate remuneration will be by way of negotiation between the users and rights holders.

10. CONCLUDING REMARKS

It is true that an individual's right should be protected for his own creation but before any creator creates anything, he learns that creativity from the culture that surrounds him. Hence, that should be taken as a consideration while maintaining balance between the rights of creators and users.

⁴⁸⁵ [Bartow Ann](#), "[Educational fair dealing in copyright: reclaiming the right to photocopy freely](#)", *U. Pitt. L. Rev.* Vol. 60 No. 149 1999.

⁴⁸⁶ [Geller, Paul Edward](#), "[Reprography and other processes of mass use](#)", *Journal of Copyright Society U.S.A.* Vol. 38 No. 21, 1991.

⁴⁸⁷ *Id.*

⁴⁸⁸ [Dillenz](#), "The Copyright Royalty Tribunals in Austria, the Federal Republic of Germany and Switzerland", *Journal of Copyright Society*, Vol. 34 No. 193, 1987.

The problem arises as to the maintenance of a just balance between the copyright owner's interest and the user's interest between the good obtained from private profit and the good obtained from public learning. But the goal of learning cannot be withheld till the copyright over a work ceases to exist. Hence there should be a balance between the interest of the users and owners of copyrighted work. In this, RROs play a major role by facilitating the access to information in inexpensive way. It should become a guardian of creativity by providing fair compensation to the owners of the copyrighted work and incentivise future creation. But without sound legislation, RRO can't effectively function in order to save the interest of both. users and rights holders. In fact, IRRO is the sole licensing authority in India in the field of literary works and grants licences on annual basis which cover books, newspapers, magazines, etc. for reprography as per law. Collective administration organisation such as RRO, if provided with organisational facilities and strength will be successfully in protecting the rights of copyright owner and user. Hence, paramount importance should be given to provide unambiguous mechanism to the RRO by framing laws in order to benefit users and right holders.