FUNDAMENTAL ERRORS IN FUNDAMENTAL PLACES: A CASE FOR SETTING ASIDE THE DELHI UNIVERSITY PHOTOCOPYING JUDGMENT

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In September 2016, a single judge of the Delhi High Court dismissed a copyright infringement suit brought by a group of international publishers, against the University of Delhi, and a photocopying shop licensed to the university. In doing so, it liberally interpreted ‘fair dealing for academic purposes’ as an exception to copyright infringement in India. The Court ruled that photocopies which are made a part of students’ reading material, even without the permission of the copyright holder, are non-infringing. In itself, this would have been a path-breaking conclusion. However, the Court went further and noted that it does not matter how much a copyrighted work is photocopied, distributed or sold, who orders or does the photocopying or, indeed, who profits from it and how much – so long as it is “in the course of instruction”, it is legal.

Now, as an appeals court of the Delhi High Court navigates through the dispute, I attempt what is perhaps the most detailed legal inspection yet of this remarkable judgment. I find that, while possibly sustainable on merits, the ruling is riddled with fundamental errors and confusions. Notably, it muddles the exceptions under Indian law which protect photocopying of copyrighted literary works for academic purposes. It potentially extends the academic fair dealing exception, to persons who are not remotely academic, nor have the slightest interest in fair dealing. It is a judgment that mischaracterizes key factors underpinning the economics of academic publishing in India. I argue that it urgently needs to be re-written – India’s students, universities, and certainly, its publishers, deserve much better.

I. INTRODUCTION

Received wisdom from Indian litigators advises you not to read too much into a case title. Often, the names of the contesting parties will

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be hidden away in an additional memo; or sometimes a primary Plaintiff or Defendant will be used solely to establish jurisdiction – the possibilities are endless. However, *University of Oxford v. Rameshwari Photocopy Services*¹ is an exception to this rule. The case title produces an unmistakable underdog effect. The judgment itself, as I shall go on to discuss, does not wander far from that premise.

The Plaintiffs in this suit represented five publishers, with Oxford University Press, Cambridge University Press and Taylor & Francis among them.² The five brought an action against the Defendants, the University of Delhi (‘Defendant University’;), and a local photocopy shop, for copyright infringement. They were aggrieved by the large scale production, photocopying, distribution and sale of compilations of extracts of the Plaintiffs’ publications, in the form of ‘course packs’.³ These course packs were put together based on readings/syllabi assigned by the Defendant University and the Defendant photocopier admittedly ran its enterprise under license from the university. These facts enabled the Plaintiffs to implead the university itself.⁴ Unsurprisingly, given the number of students and universities potentially affected, several organizations sought to intervene and address the Court on the issues in the case. Of these, the Association of Students for Equitable Access to Knowledge (‘ASEAK’) and the Society for Promoting Educational Access and Knowledge (‘SPEAK’) were upgraded to full Defendant status, largely for public interest reasons.⁵

The Plaintiffs’ case was less predictable than may be assumed. They did not argue that the act of students photocopying their copyrighted works was outright impermissible. In fact, they went to great lengths to clarify that this was not their intention.⁶ However, in the Defendants’ activities, they perceived calculated and systematic efforts to photocopy their publications, which, they felt, had crossed the line between fair dealing and copyright infringement.

The Defendants raised a fundamental question to open their defence – who exactly had a problem with their photocopying? They pointed to

² *Id.*, ¶1.
³ *Id.*, ¶2.
⁴ *Id.*, ¶18(xxv) and (liv) (The University would later claim that they threw themselves in the firing line “in the interests of the students” even though the University itself “had nothing to do” with the actions complained of).
the fact that, of the fifty-two authors whose works were allegedly being photocopied in their course packs, thirty-three had no problem with it. The Plaintiffs’ action, therefore, was not so much an authors’ claim vis-à-vis the University and the students, as much as it was a publishers’ claim vis-à-vis the University and the students. However, casting it as such is uncharitable to the Plaintiffs.

Instead of an outright claim that the Defendants’ course packs were violating copyright laws, the Plaintiffs admitted that their endgame was in settling the dispute by way of a licensing agreement with the Defendant University. The exact terms on offer are unclear from the judgment itself. However, the Defendants’ reluctance to accept the terms suggests that the license fees were unacceptable, or that the Plaintiffs had demanded, in addition to the licensing money, more than just a simple pact of non-interference with the preparation and distribution of course packs, or some other combination of the two.

What is clear is that the Plaintiffs’ recorded case is that they wanted the Defendant University to take a license from them, via a legally recognized copyright collection agency, the Indian Reprographics Rights Organization (‘IRRO’). Their projections indicated that the cost of the license would be Rs. 12,000/- (~ US$ 180) per college per year. This would have amounted to an outlay not much more than the terms of their arrangement with the Defendant photocopier, and indeed, less than the amount recovered by the Defendant University from a single student in a year.

In September 2012, the Defendant University was asked by the Court to consider the Plaintiffs’ proposal for licensing the copyrighted works in question. It certainly appears as though the proposal became a cause of considerable disagreement between the parties – a disagreement that gained momentum after an order was passed by the Court the following month, suspending the operations of the Defendant photocopier. The Plaintiffs believed that they were reasonable terms, while the Defendants argued that they were too narrow and controlling. Instead of discussing these terms or attempting to find a solution to the dispute out of court, the only finding the Court recorded to
this effect is that the licensing options need only be explored “if it is found that the Defendants are infringing.”

This reasoning is baffling and lacks merit, for a license in this case, or a settlement of any kind, is not a backup to a litigation outcome. It certainly cannot be declared so by a Court while it is still actively seized of the question of infringement. Quite to the contrary, a license in this case would have functioned as a safety valve, against an outcome that one or more parties did not wish to risk.

Indeed, there were several factors in operation which suggest that a settlement may not have been the worst outcome in this case: the law on fair dealing in copyright, under §52 of the Indian Copyright Act, 1957 (‘Act’), was fairly ambiguously worded and untested; the hearings were extremely long and drawn out\textsuperscript{15} and involved multiple parties raising a certifiable maze of oft-contradictory contentions; and, the judgment itself, which admitted to having only a single question to rule on - that of whether the Defendants’ course packs infringe the Plaintiffs’ copyright\textsuperscript{16} - runs well in excess of 20,000 words, having been held in advisement by Mr. Justice Endlaw for a period of almost twenty-two months.

This paper proceeds in three further Parts. In Part II, I travel through the judge’s important findings in the order in which they are presented in the judgment. These encompass rulings on critical questions such as whether Indian law protects non-statutory copyright, the extent to which §51 of the Act empowers copyright holders to pursue infringement actions, the respective roles of §52(1)(a) and (i) of the Act in saving the Defendants’ actions, the extent to which works such as course packs and persons associated with the Defendants can benefit from fair dealing exceptions and the value of international covenants and precedents in interpreting this particular furrow of Indian copyright law. Part III then focuses on questions which the judge leaves unresolved, most notably the commercial nature of the Defendants’ arrangement and the quantum of permissible copying from individual works. These run alongside a characterization of the market for academic publishing in India, which, once again, highlights certain key weaknesses in the judgment. I conclude in Part IV with a review of the prominent difficulties with the judgment which need to be addressed by the appeals court, where the case is currently pending adjudication.

\textsuperscript{14} Id., ¶23.


II. THE DU PHOTOCOPYING CASE: KEY QUESTIONS AND FINDINGS

A. STATUTORY VERSUS ‘NATURAL’ COPYRIGHT

The point of departure for the judge is whether copyright is purely statutory or also has an organic, natural basis.\textsuperscript{17} The unspoken comparison here seems to be with §27 of the Indian Trade Marks Act, 1999 which protects a trademark holder’s freedom to sue for unauthorized use of its unregistered trademark under the common law of passing off. The judge summarizes his view on the subject in the following words:

“§13 of the [Copyright] Act defines the works in which copyright subsists but makes the same subject to the provisions of that Section as well as other provisions of the Act. The same leads me to form an opinion that copyright, \textit{though may subsist under the natural law in any work}, has been made subject to the statute and if the statute limits the works in which copyright subsists, there can be no natural copyright therein.”\textsuperscript{18}

§13 sets out the boundaries to copyright claims, subject to the rest of the Act. However, the judge makes three errors from this point forward. First, he asserts that this may mean that copyright in a natural, non-statutory sense may attach outside the walls of the Act but offers no reason for this assumption. Second, he states that the limitations imposed by the Act, on the works in which natural copyright may subsist, have an exclusionary effect. Thus, once something comes under the scope of §13, all natural copyright in those works is lost and only the rights in these works, which are allowed under the Act, become available. Again, the judge offers no reason for this assertion. Third, he extends this ‘naturally existing but now displaced by the Act’ characterization of copyright to §14 of the Act. This section is exhaustive of the substantive rights available to rights-holders. This means that if a copyright is sought to be enforced, §14 represents the sum total of rights available to the rights-holder, since natural copyright now stands displaced by the Act.

Illustratively, the judge states that the right to reproduce a literary work or any substantial part thereof is ordinarily held by the rights-holder. However, if another clause of the Act were to “provide otherwise”, the copyright under §14 will then cease to exist.\textsuperscript{19} Such a right would not be modified to the extent of the restricting clause; it would not merely displace the natural

\begin{itemize}
  \item \textsuperscript{17} \textit{Id.}, ¶25.
  \item \textsuperscript{18} \textit{Id.}, ¶25 (The emphasis in this quote, as with others in this essay, is mine. I have also edited some quotes for clarity).
  \item \textsuperscript{19} \textit{Id.}, ¶27.
\end{itemize}
copyright and substitute it with the copyright permitted under the Act - instead, it would cease altogether.

This formulation is hard to defend. This is because such exceptions do not, in all cases, extinguish copyright ab initio. Arguably, this is true even of fair use provisions, for instance, where the right ordinarily exists but is merely suspended against fair users. Thus, the formulation clearly overreaches the effect of provisions which modify or limit copyright.

Furthermore, the judgment does not explain why the status of natural copyright stands so curtailed by §14. The difficulty is this: by the judge’s interpretation, §13 still leaves open the possibility of some works (those not covered under §13) in which natural copyright may subsist. However, this possibility is entirely shut down by the Court when it states that “[§14] is again indicative of the [rights-holder] having only such rights which are prescribed thereunder and, that too, subject to the other provisions of the Act.”20 The judge may have benignly intended to enlarge his ‘naturally existing but now displaced by the Act’ characterization of copyright to §14, but this enlargement simply breaks down under scrutiny.

Bizarrely, the judge promptly withdraws the entire ‘natural copyright’ hypothesis when confronted with §16, which “unequivocally prescribes that there is no copyright, except as prescribed in the Act.”21 However, he caveats this by stating that §16 converts copyright from a natural or common law right to a statutory right.

This could be interpreted in two ways, neither of which is ruled out by the judge. First, it could mean that the natural copyright in a work merely changes form to become a statutory right, without extinguishing the natural copyright. Second, it certainly appears to suggest that the Court understands there to be, conceptually at least, a natural copyright - except that it is not protected under the Act.

B. THE §51 PROBLEM

The judge then sets out the provisions of the Act on which the Plaintiffs’ action was founded – §§ 51, 52 and 55 of the Act.

Infringement has been defined as any act, the exclusive right to do which, has been given to the rightsholder. The judge views this to mean that where there is no exclusive right, there can be no infringement. While this abstraction is not incorrect, it does miss some crucial details on the layout of §51.

20 Id., ¶28.
21 Id., ¶28.
First, the list of acts mentioned in §51 does not precisely correspond to the list of acts to which exclusive rights accrue to rights-holders under §14. For instance, in relation to literary works, §14 permits the rights-holder to exclusively reproduce, issue copies of, perform, translate or adapt the work. However, §51 is far broader. It defines infringement as not only all acts which the rights-holder has exclusive rights to, but also several other acts, ranging from making money off premises in which infringing acts are conducted, to prejudicially affecting copyright by distribution of infringing works.

The judge views these grounds for infringement as acts that are inherently profit-oriented. On this basis, he commits to a distinction between “infringement of exclusive rights” [§§14(a)(i) and 51(a)(ii)] and “facilitating infringement and dealing in infringing copies” [§§ 51(a)(ii) and (b)(i)-(iv)]. In the first category of actions, the judge finds that a commercial element is irrelevant. However, in the second category of actions, a commercial element is essential.

There are a few difficulties with such a distinction. First, if the second category involves a commercial element by hypothesis, why does §51(b)(ii), for instance, identify the “distribution either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright” as an infringing act? Does the latter half of this condition not cover acts that could be non-commercial?

Second, it is evident that §§51(a)(i) and (ii) on infringement of exclusive rights and abetting infringing communication of the work, respectively, are controlled by the words that open §51(a). These words make sub-clauses (i) and (ii) applicable to four types of persons:

1. those without licenses from the rights-holder;
2. those without licenses from the Registrar of Copyrights;
3. those in contravention of the conditions of a license granted by either the rights-holder or the Registrar of Copyrights; and
4. those in contravention of any condition imposed by a competent authority under the Act.

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22 Copyright Act, 1957, §§ 14(a)(i)-(vii).
23 Copyright Act, 1957, § 51(a)(i).
24 Copyright Act, 1957, §§ 51(a)(ii), (b)(i)-(iv).
26 Id., ¶38.
In these circumstances, it is crucial to ask, what value does the ‘optionally commercial’ versus ‘necessarily commercial’ distinction impart to the language at the top of §51(a)?

Finally, on structure alone, it is irksome to interpret the statute in such a way that, even if it does distinguish between non-commercial and commercial infringement, it does so by tagging necessarily commercial infringement under §51(a)(ii) with optionally commercial infringement in §51(a)(i) and set out further four necessarily commercial types of infringement separately in §51(b). If the infringement under §51(a)(i) already covers the violation of exclusive rights under §14(a), which includes the right to reproduce and issue copies whether or not commercial, why restate making and distributing infringing copies as acts of infringement under §§51(b)(i) and (ii) respectively?

My sense is that the intent behind splitting §51 into two categories of acts [viz., §§ 51(a) and (b)] was never to distinguish possibly commercial acts from necessarily commercial ones, in the first place. The distinction, if there is one, is to be found by giving effect to the contrast in opening particular phraseology of §§51(a) and (b). As such, it appears that the distinction was intended to be between conditions that rights-holders (or other authorities) could enforce against potential or defaulting licensees [to wit, §51(a)] and conditions that rights-holders could enforce against any person [§51(b)].

It also bears mention that the language used in §51 is of copyright being “deemed” to be infringed, not just infringed per se. This suggests that when any of these acts is found to have occurred, the default assumption is that infringement has taken place. This observation is important, since §52, which deals with exceptions to infringement, does not use the same words. Instead, §52 isolates “certain acts” which do not constitute copyright infringement. Therefore, a characterization of §51 as the default rule, and of §52 as saving certain specific acts from this rule, would not be inaccurate.

Further, the judge states that even if a rights-holder’s exclusive rights are violated, such actions would not constitute infringement if they are saved by §52. Once again, while this is not inaccurate, it is not exhaustive either. It does not explain the fate of those actions deemed to be infringing under §51, but which the rights-holder does not have exclusive rights over.

27 This speaks to the legal meaning of the word ‘deemed’ itself. The Indian Supreme Court has uncontroversially supported the position that the word ‘deemed’ is frequently used to give to the statutory language, in a given case, a comprehensive description that it includes what is obvious or what may safely be assumed. It is in this sense that § 51 uses the word ‘deemed’. See Premier Breweries v. State of Kerala, (1998) 1 SCC 641, quoting St. Aubyn v. Attorney General (No. 2), 1952 AC 15 (HL), per Radcliffe L.

28 Copyright Act, 1957, Marginal heading to §52.
Finally, the judge reads §55 of the Act as constraining rights-holders’ entitlement to sue “unless there is infringement of copyright within the meaning of the Act”. This is slightly imprecise, as §55 controls a rights-holder’s entitlement to relief, not its right to sue. (A suit may, of course, be brought and dismissed, and nothing stops a rights-holder from bringing such a suit).

More importantly, though, there is a distinct tension between §55, which describes the rights-holders’ entitlement to relief, and the prohibition on non-statutory copyright claims by §16. The former permits a rights-holder to seek injunction, damages and accounts, as well as other remedies that “may be conferred by law for the infringement of a right”. The broad strokes of this language once again hint at possible remedies in equity or at common law that could be availed of by the rights-holder. By contrast, §16 shuts down the possibility of such remedies being claimed, unless the copyright is itself subject to the terms of the Act.

All this conveys an unshakeable impression that the Court’s initial natural copyright hypothesis runs deeper than the Act itself. However, confronted with previous Indian case law which had consistently found there to be no non-statutory basis for asserting copyright in view of §16, the Court’s mind swiftly hardens on the issue. “I conclude,” says the judge with finality, “there can be no copyright in any author, composer or producer save as provided under the Copyright Act.”

C. THE COPYRIGHT EXCEPTION INQUIRY

The judge proceeds to frame the question of copyright infringement in a straightforward manner: does the acts of making copies of the Plaintiffs’ books purchased by the University and then distributing these copies to the students, amount to acts which only the Plaintiffs, as rights-holders, are entitled to do?

The judge is right to observe that the act of making photocopies is, on the face of it, covered by the rights-holders’ exclusive right to reproduce its own works under §14(a)(i). He therefore concludes that, without anything...
further, simply the act of making photocopies would constitute infringement under §51.

Thereafter, the judge notes that §14(a)(ii) expands the rights-holders’ exclusive rights to include issuing copies of the work. Two timely clarifications are issued at this point. First, the judge observes that the act of issuing copies need not be in exchange for money, to constitute infringement. Second, the judge reasons that the exclusive right under §14(a)(ii), when read with the Explanation to §14, is restricted to copies of the work that are made after the first sale of the work (in this case, after the sale of the work by the rights-holders to the University). Once again, there is no quarrel with this view. So far the judge could hardly have gone astray.

The judge finds that §52 is a proviso or exception to §51. The attempt to locate §52 in this context is convoluted. He initially characterizes §52 as a ‘but for’ provision, which saves the specific acts under §52 from infringement. However, in considering whether §52 should be considered a proviso or exception to §51, he concludes that it should not be considered either.

In arriving at this conclusion, he first briefly summarizes §§2(m), 14, 16 and 51(a)(i). The judge then advances the following sweeping conclusions:

(1) that the legislature has abrogated the natural or common law rights of authors;

(2) what constitutes copyright has been statutorily enacted and made subject to other provisions of the Act;

(3) the headings “when copyright infringed” and “certain acts not to be infringement of copyright” have been prescribed in successive provisions of the Act;

(4) the right to civil remedies has been limited only to situations when copyright has been infringed;

(5) Once the acts listed in §52 are declared as not constituting copyright infringement, it follows that the exclusive right to do these acts has not been included by the legislature in the definition in §14.

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34 The judge also notes, in a manner that is far more complicated that necessary, that the exclusive right to make copies under §14(a)(i) and the exclusive right to issue copies under §14(a)(ii) are separate acts. Id., ¶36.
35 Id., ¶40.
36 Id., ¶39.
37 Id., ¶41.
As explained below, all these statements are unsettling. The first statement suggests that rights-holders retain no natural or common law rights. This is at variance with the judge’s earlier reading of ‘natural copyright’, which had found that such rights are present but expressed in statutory form or, at worst, converted to statutory rights. ³⁸ Nowhere in that discussion does the word ‘abrogated’ appear.

The second statement is a regurgitation of a previous assertion. It does not aid in arriving at a conclusion regarding the relationship between §52 and §51.

The third statement, which relates to the sequence of the provisions, is inconclusive, since if the point sought to be made is that §§51 and 52 stand independently on account of their order of appearance in the Act, it could conversely be asserted that this very successive appearance suggests a default-exception relationship.

The fourth statement is concerned with the events when the rights-holder may claim relief. That the rights-holder may only do so when its rights are infringed is self-evident. It does little to advance a reason for why certain acts that would ordinarily set up infringement, for which room is carved out by §52, should not be read as a proviso or exception to the default finding of infringement in such cases.

The error in the final statement has its roots in the judge’s ‘optionally commercial versus necessarily commercial’ distinction discussed at Part II B of the paper above.

The judge fails to appreciate that exempting certain acts from copyright infringement is unrelated to whether or not the exclusive right to do these acts has been included under the rights-holder’s exclusive rights under §14. Further, the inclusion or exclusion of certain acts within §14 cannot logically ‘follow’ from the exemption of those acts under §52. Whether or not something is included in §14 is a matter of reading the statute - it is not a logical deduction based on some other provision. To read it so would be to read §52 in isolation and in priority to §14, something that the Act does not authorize.

More important than the faults with the individual conclusions, where lies the nexus between these assertions – even if true – and the finding that §52 is not to be interpreted as a proviso/exception? The judge offers no explanation for this. To be sure, his may well be a defensible characterization of §52. However, treating this nexus to be something self-evident brings us no closer to appreciating this characterization.

³⁸ Id., ¶28.
Instead, the Court offers a legal defence for this interpretation by way of a comparison with another statute, The Benami Transactions (Prohibition) Act, 1988.39 This is a rather left-field attempt to compare provisions across dissimilar statutes, ostensibly seeking to find a statute other than the Copyright Act, where one provision permits for rights for certain persons to be acknowledged in derogation to a general prohibition. This is certainly true of §3(2) of this benami law, which permits such transactions for the benefit of one class of persons even though the Act itself prescribes a general prohibition on such transactions.

However, this is about as far as the comparison will travel. §3(2) of the benami law is worded in the form of an exception. §4, which prohibits the enforcement of benami actions, also makes an exception in §4(3) for actions in the nature of §3(2). The language used in both clauses is to the effect of “nothing in this [Section] shall apply to [the transactions exempted]”. The benami law prescribes a general rule of prohibition for such transactions but makes exceptions for the classification and enforcement of the permitted type of benami acts.

§§52 and 55 of the Copyright Act on exceptions and enforcement of rights are dissimilarly worded. There is no non-obstante language. There does, however, appear to be an intention to liberate the acts under §52 from the scope of infringement, as is evident from the title of the section, which reads ‘certain acts not to be infringement of copyright’. §55 is consistent with this interpretation as well. If this is a fair reading of §52, the judge’s next words make little sense. He holds:

“[Similar to the benami law] here, to hold that in spite of the legislature having declared the actions listed in §52 to be not amounting to infringement, the same have to be viewed putting on the blinkers of being infringement would amount to holding that the Copyright Act which allows actions listed in §52 to be done without the same constituting infringement and consequences thereof not constituting infringing copy, cannot be done to the extent permitted by the language of §52……Thus, §§14 and 51 on the one hand and §52 on the other hand are to be read as any two provisions of a statute.”40

It is settled that §52 lists acts that constitute copyright infringement. Viewing §52 by “putting on the blinkers” of infringement, therefore, is a non-starter of an idea. There is also little dispute over the fact that §52’s acts


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are absolute defences to copyright infringement. Why then, the insistence on the phrase “to the extent permitted by the language of § 52”? Are these acts, in the judge’s view, broader defences that are somehow restricted in India by their iteration in §52? Is there a subtext of possible overreach of these provisions that the judge is attempting to warn us about? There is, once again, a pervasive lack of clarity on this issue.

Moreover, this is not the proposition that the judge set out to test. He was faced with deciding whether §52 should be read as an exception to §51 or if it should be read independently as a rights-conferring provision, unobstructed by §51. He concludes the latter, which is a perfectly defensible interpretation, even though there was doubt among the Defendants themselves about whether this was the case they were advancing.41

However, the reasons by which he reached the conclusion, through the bizarre benami detour, at best support the conclusion that the acts under §52 do not constitute infringement. There is a huge logical gap here, and one which, unhappily guarantees that any interpretation of the substance of §52 itself will have to be accompanied by an asterisk.

D. THE §52(1)(A) EXCEPTION

As such, the inquiry before the judge resolves itself into a straightforward question of whether the Defendants’ actions constitute acts protected by §52 of the Act. He finds that the only potential provision that could save the Defendants is sub-clause (i) to §52(1). Interestingly, in getting to this point, he finds that the Defendants’ actions are not protected by §§52(1)(a)(i) or (ii), which save fair dealing in a copyrighted work for research, criticism or review.42 However, he does not explain how or why the Defendants’ actions are not in advancement of these purposes.

Instead, he offers a justification based on statutory interpretation. He states that §52(1)(a) is worded in broad terms whereas other clauses under §52(1), including sub-clause (1)(i), are worded narrowly.43 He finds this an appropriate opportunity to apply the principle that specific provisions override general ones.44 Therefore, in his view, §52(1)(i) alone applies to the Defendants’ actions, to the exclusion of § 52(1)(a).

41 The Defendants’ arguments recorded by the judge assert, at one point, that §52 is not to be viewed as an exception but instead as codifying rights of users, which rights ought not to be restricted. At another point, it is claimed that it is irrelevant whether §52 is taken as an exception to infringement or as creating independent rights. Id., ¶15(xxv) and 18(xii).
42 Id., ¶43.
This choice of isolating §52(1)(i) is justified by eliminating the applicability of §§ 52(1)(h) and (j), both of which also relate to exceptions for education/instruction. While this is a fair point, the manner in which the judge does this is hardly orthodox.

The unsuitability of §52(1)(j), which relates to academic films and sound recordings, is straightforward. So too is the unsuitability of §52(1)(h), which relates to reasonable reproduction of dominantly non-copyrighted matter intended for instructional use. However, the judge fixates on the word “publication” in §52(1)(h), with damaging effect.

He interprets “publication” to mean preparing and issuing copies of works for public sale by the rights-holder and “does not refer to the act of making photocopies of [an] already published work and issuing the same”. This interpretation collapses with the slightest nudge.

Neither the aforementioned limitation on ambit to the rights-holder, nor the restriction on issuing copies of a previously published work, is specified in the definition of “publication” in §3. If the former were true, consider, for an instant, the fact that the word “publication” in all its forms appears at no fewer than seven places in §52 alone – viz., §§ 52(1)(e), (h), (p), (q), (r), (s) and (t). If publication were to be restricted to for-profit releases by rights-holders alone, all seven categories are meaningless at inception. Equally, if the latter were true, updated editions, revisions and reprints of copyrighted works by the rights-holder would not be considered publications. This interpretation, therefore, appears to be absurd.

The Court goes on to recant the latter observation later in the judgment, acknowledging that publication would include such updated works by the rights-holder. This, however, only creates doubt about which of the two positions the Court endorses. As such, it can safely be said that this interpretation is unsustainable.

Returning to the judge’s finding that §52(1)(i) is attracted to the Defendants’ actions in preference to §52(1)(a), this, too, appears to be misdirected on at least two counts.

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46 Id., ¶50.
47 Id., ¶48, 14(ze) (dismissing an interpretation to the contrary raised by the Plaintiffs).
48 Nor, indeed, is the restriction stating that ‘publication’ entails making a work available to the public for the first time, as the Court later suggests. Id., ¶57.
49 Id., ¶57.
First, the judge supports this finding by stating that since §§52(1)(i) applies pointedly to education/instruction, the scope of this provision cannot be expanded by applying the more generic words of §52(1)(a) when a more specific provision exists. However, § 52(1)(a) does not have a controlling effect over the interpretation of the rest of the Section – it is merely one of several sub-clauses which list out permissible non-infringing acts. In other words, §52(1)(i) is not a sub-clause to §52(1)(a). The two are independent provisions. If the two were intended to be connected provisions, surely – to employ a trope beloved of Indian judges – the legislature would have said so in the Act. Therefore, the question of §52(1)(i) being read up or read down based on § 52(1)(a) does not arise.

Second, the application by the judge of the ‘specific overrides the general’ principle itself is inapposite. Generalia specialibus non derogant – the principle that a general law cannot be interpreted to derogate from a specific one – assumes that there are two provisions, a general one and a specific one, which apply to the same case. Once the applicability of both provisions is ascertained, the law requires the specific to be preferred over the general.

Surely, though, it is incumbent on the judge to explain why the Defendants’ actions cannot be corralled into §52(1)(a) in the first place. He fails to explain how photocopying and distributing course packs by the Defendants would ‘not’ further research, criticism or review of the Plaintiffs’ books. Crowding the Defendants out of the fairly expansive and intuitive exemption in §52(1)(a) requires reasoning that the judge does not offer. This is problematic, not just for reasons grounded in statutory detail, but also because, if taken as precedent, it cuts off reliance on §52(1)(a) in its entirety, by future educationists and their agents who may find themselves embroiled in ‘fair use’ trouble. This appears to be a grossly unjustifiable outcome, even in the polar extremes that typify the Indian law on copyright.

E. THE §52(1)(I) INTERPRETATION

This leads the judge to consider §52(1)(i) of the Act, which saves the reproduction of any work by a teacher or pupil in the course of instruction (§52(1)(i)(i)) or in the form of questions or answers in an examination (§§52(1)(i)(ii) and (iii)).

At first glance, the impression that §52(1)(i) is a fairly narrow one is unshakeable. This is because it mentions specific persons (“teacher”, “pupil”) and specific scenarios (“course of instruction”, “examinations”). Further, it uses the word “reproduction” and not “publication”, which, according to the
Court, “entails ‘copying’ for limited use i.e. for an individual or for a class of students being taught together by a teacher.”

The impression is amplified by contrasting it with §52(1)(j), which speaks of “educational institution”, “staff” and “students” – something that does not escape the attention of the judge. However, he still finds that §52(1)(i) – the real bone of contention in this case – ‘cannot’ be restricted in its scope to educational interactions between “an individual teacher and an individual pupil”. His reasons for this are three-fold.

First, reaching deeper into the well of statutory interpretation, the judge says that law is temporally isolated and it must be assumed that legislations are drafted according to prevailing “laws and societal situations”. Since education is now delivered en masse and institutionalized, teachers imparting education individually has no meaning. That would be fair enough, except the judge’s very next words are to the effect that there is no reason to interpret §52(1)(i) in relation to individual teachers and pupils since such individual instruction “neither at the time of inclusion thereof in the statute nor now exists in the society.”

The judge’s refusal to interpret §52(1)(i) in relation to individual teachers and pupils is puzzling. It can either be asserted that there used to be one-to-one teacher/student instruction which is no longer prevalent or it can be asserted that such individual instruction never existed. These are mutually exclusive claims. If the former is true, why make the latter statement at all? If the latter is true, why would the legislature phrase §52(1)(i) in terms of teachers and pupils? There is no attempt to resolve this obvious contradiction.

To be clear, there is every reason to believe that casting this clause in terms of individual teachers and individual pupils is incorrect to begin with. §52(1)(i)(i) protects the “reproduction of any work by a teacher or a pupil in the course of instruction”. The interpretation of the article “a” here to exclusively connote individual teachers or individual students misses the point. If read in ordinary English, the meaning is not dissimilar to if the sub-clause had been phrased with plurals, that is to say ‘reproduction of any work by teachers or pupils in the course of instruction’. Reaching for the ‘times are changing’ line to bypass a construction that is plainly in sight is unnecessary. Yet, this is exactly what the judge does while interpreting §52(1)(i)(i).

50 Id., ¶57.
51 Id., ¶54.
52 Id., ¶54-55.
53 Id., ¶55.
54 Id., ¶55.
Second, he reasons that the phrase “purposes of teaching, research or scholarship”, which appears in Explanation (d) to §32(6) of the Act, has been defined expansively. The phrase has been defined to mean “purposes of instructional activity at all levels in educational institutions, including schools, colleges, universities and tutorial institutions and purposes of all other types of organized educational activity.” He finds no reason to hold that the legislature intended to exclude teachers and pupils in an educational institution from the scope of this provision. However, there are several problems with this reasoning.

First, the difference in language between §32(6), Explanation (d) on one hand and §52(1)(i)(i) on the other is stark. Barring a massive oversight, it is hard to see how the legislature did not intend to restrict §52(1)(i)(i) to teachers and pupils knowing full well that the exception could have been extended to educational institutions and purposes at large, as they have done elsewhere in the Act.

The potential oversight assumes preposterous proportions, when one considers that §32(6) was incorporated into the Act over a quarter of a century after what is now §52(1)(i)(i). Therefore, it must be concluded that §52(1)(i)(i) covers only teachers and pupils, since it was drafted with those words and has now survived six different amendments to the Copyright Act.

Second, the judge needed to, at a minimum, clarify why he found it permissible to read definitions intended for one Section into another. Rather than doing this, the judge, reads the Section strictly by the words in it, and technically only makes the case that teachers and pupils were intended to be included in the scope of §32(6), not that the definition appearing in Explanation (d) to §32(6) should be read into §52(1)(i).

Even assuming that the latter is the intention, it is no more palatable. At its core, the objection boils down to this: if this kind of glaring overreach is to be approved or excused, it should at least be judicially acknowledged that the statute has weaknesses and that an overreach of this nature has been rendered necessary. Further, it appears to be incumbent on the judge to offer reasons why the facts of the present case support such an extraordinary reading of the Act.

To reiterate a contention advanced previously, it appears that this adoption of “purposes of teaching, research or scholarship” meshes much better.

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57 The Copyright Act came into force in January 1958, containing what is currently §52(1)(i) (i). §32(6) was inserted by The Copyright (Amendment) Act, 1983, which came into force in August 1984.
with fair dealing for research and review under §52(1)(a). If this is true, then it does not appear plausible why so much effort is expended on excluding §52(1)(a) from applicability, or on shoehorning phrases and meanings that simply do not fit into §52(1)(i)(i). None of these difficulties with the judge’s view appear to have ready resolution.

Third, the judge looks to recent amendments of the Copyright Act to suggest that the trend has been towards broadening fair use exceptions. This is certainly true of the example quoted by him – viz., the expansion of §52(1)(h) to cover those specific acts “for instructional use”. However, no such amendment of §52(1)(i) has been effected. Therefore, it cannot be assumed that the legislature intends §52(1)(i) to be read broadly, but will not amend it and instead amend the provisions surrounding it. In fact, to the contrary, this is a surer suggestion than any, that the legislature, certainly as of June 2012, saw nothing wrong with the functioning of §52(1)(i).

F. “IN THE COURSE OF INSTRUCTION”

Having advanced his views on why §52(1)(i)(i) applies to more than just individual teachers and pupils, the judge proceeds to discussing the meaning of the expression “in the course of instruction” in this provision.

Here, predictably, the contrast between the rival contentions was evident. The Plaintiffs’ contention was that “in the course of instruction” covers teachers imparting instruction to pupils inside a classroom environment (lectures, tutorials and the like) and any works reproduced in reasonable nexus with this relationship. The Defendants, however, had to defend: (1) the prescription by the Defendant University of portions of works known to be copyrighted by the rights-holders and unlicensed by the University; (2) the making of photocopies of these works by the Defendants and (3) the supply of these to students.

58 University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 5128 : (2016) 233 DLT 279, ¶56 (A version of the 2012 amendment drafts had this as “for use in educational institutions” but this phrase was dropped for the broader “for instructional use”. There was a suggestion by the Plaintiffs that §52(1)(h), among other provisions, would become otiose if §52(1)(i) was read broadly); University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 5128 : (2016) 233 DLT 279, ¶14(j), (zb) and (zh), 20(XII) (Predictably, the Defendants argued the opposite – that “for instructional use” actually cleared the deck for copyrighted works to be reproduced liberally). University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 5128 : (2016) 233 DLT 279, ¶18(xxvi) and (xxvii) (§52(1)(i) could be argued to require a narrow construction for many reasons but, given the negligible overlap with §52(1)(h), it seems unlikely that saving circumstances for §52(1)(h) to apply to would be one such reason).

59 June 21, 2012 saw the enactment of The Copyright (Amendment) Act, 2012 which, inter alia, brought amendments to §§52(1)(a), (b), (c), (d), (e), (f), and (h).

The Court begins by returning to the dictionary roots of the word ‘instruction’. After drawing on multiple sources including Indian case law, it finally settles on a functional definition. Instruction, it says, refers to “something which a teacher tells the student to do in the course of teaching or detailed information which a teacher gives to a student…to acquire knowledge of what the student…has approached the teacher to learn.”

The words “in the course of” are, according to the judge, also to be read broadly. Relying on dated non-copyright Indian case law, he finds that previous courts have identified certain “tests” for whether something is “in the course of” an activity. These tests are:

(i) integral part of continuous flow (drawn from a constitutional provision regulating import and export);
(ii) connected relation (drawn from sales tax legislation);
(iii) incidental or causal relationship (drawn from laws permitting workers to bring accident/injury claims);
(iv) during (in the course of time, as time goes by) or while doing (drawn from an employee insurance law);
(v) continuous progress from one point to the next in time and space (drawn from a tax statute discussing what constitutes an assessment year); and,
(vi) in the path in which anything moves (drawn from a contempt of court law).

From this discussion, he makes the following comments about §52(1)(i):

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63 Id., ¶¶ 63-72.
64 State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory, AIR 1953 SC 333.
(i) the reproduction of a work in the process of imparting instruction, that is to say, an entire academic session for which a pupil is formally under a teacher’s instruction, is covered by §52(1)(i);

(ii) imparting and receiving instruction is not limited to personal interactions between teachers and students, but commences right from the time a teacher prepares for imparting instruction, and includes every academic activity from this point forward – setting syllabi, prescribing readings, interactions between teachers and pupils in classrooms or otherwise, the act of studying by pupils outside the classroom, all the way up to teachers reproducing works as part of questions in an examination and pupils doing likewise in their answers to such questions.

“Resultantly,” says the judge, “[the] reproduction of any copyrighted work by the teacher for the purpose of imparting instruction to the pupil as prescribed in the syllabus during the academic year would be within the meaning of §52(1)(i).”

Given the ambiguity of the language of §52(1)(i)(i), objections to such an expansive reading of “in the course of instruction” should probably be directed at the legislature, not the judiciary. Even so, there are three things to be noticed here.

First, it would have been more helpful if the judge had interpreted “in the course of instruction” by comparing likes with likes. He could have conveniently looked to copyright law elsewhere which uses the expression “in the course of instruction” in the context of educational fair use. Surely, this would have been a more desirable route than splitting the phrase into two parts and scouring for meanings to be attached to these parts individually, from cases decided many years ago; from a mishmash of statutes, and then cobbling together an incomplete list of possible meanings.

Second, in ordinary English, there is a clear distinction between an ‘act prior’ and an act ‘in the course of’. The former assumes that the central act has not yet commenced, whereas the latter assumes that it has. The judge’s
inclusion of the teachers’ personal preparation, prescription of reading material, and so on, appear to fall under acts prior to instruction.

In fact, at one point during the draft stages of the 2012 amendment, a suggestion was made that §52(1)(i) should apply to copies made “in the course of preparation for instruction” but this did not make the final cut. The Plaintiffs argued, reasonably, that discarding this expression indicated that stages in preparation for instruction were not meant to be protected as fair dealing.\(^{72}\) However, the judge does not address this.

There is also confusion about precisely how the course packs are prepared and how the judge views them. If the course packs are prepared before the first interaction between teachers and pupils, would that have an impact on whether they are considered acts prior to instruction or acts in the course of instruction? There is still considerable doubt over this in a factual sense, which is left unresolved.

\textit{Third}, such a broad interpretation of §52(1)(i)(i) makes an uncomfortable reading in contrast with other provisions of the Act, most notably §52(1)(o). This provision prohibits the making of more than three copies of a book by a library for its own use where the book itself is not available in India.

The facts before this Court was admittedly different, but how far apart are they? More accurately, does it make sense that an Act with a clause as restrictive as §52(1)(o), would simultaneously house a provision that effectively permits teachers and pupils to make unlimited copies for unrestricted use of books, whose number is limited only by how many such books are included in the reading list/course pack by the teacher? The judge does not consider §52(1)(o), and this issue, too, remains unresolved.

\textbf{G. THE U-TURN ON §52(1)(A)}

The judge then returns to §52(1)(a) and notes that though the Section is inapplicable to the acts of the Defendant University in making photocopies of copyrighted works, if these works are made available to students in libraries, that \textit{would} constitute fair dealing under §52(1)(a).

On this basis, he says that, if the act is not punishable at the door of the students under §52(1)(a), it ought not to be punishable at the door of the Defendant University either. Thus, just a few paragraphs after concluding that the acts of the Defendant University \textit{are not} saved by §52(1)(a), the judge says that they \textit{are}.\(^{73}\)


\(^{73}\) Id., ¶74.
He defends this on the back of a decisive shift in the type of technology available today. He employs the logic that if an action, such as students borrowing books from a University library and making handwritten copies of them, which was “onerously done”, is not infringement, it does not become infringement because it is now easier to perform, due to advancements in technology.\textsuperscript{74}

To clarify that he means the recent shift towards photocopying and printing images taken on cell phones,\textsuperscript{75} he states that if the result/effect of action is the same, the difference in the \textit{mode} of action cannot convert a non-infringing act into an infringing one.\textsuperscript{76} For additional context, he offers up his own experiences while studying law, when quick and cheap photocopying was not available.\textsuperscript{77}

He proceeds to say that §52(1)(a) would protect \textit{even the actions of the Defendant University}.\textsuperscript{78} He justifies this on the basis of several mitigating factors – limited original versions of the copyrighted works available in libraries, limited time for instruction, the pressure of student demand on scarcely available copyrighted works,\textsuperscript{79} the risk of damage to the original works by repeated photocopying.\textsuperscript{80} There are three significant difficulties with this reasoning.

\textit{First}, it categorically contradicts the judge’s earlier view that §52(1)(a) is not attracted in the present case. The words used by the judge previously were, “I thus hold § 52(1)(a) to be having no applicability to the impugned action”.\textsuperscript{81} There is no ambiguity here. The only meaning possible is that §52(1)(a) has no application to the \textit{action as a whole}, whether the photocopying, distribution, sale or purchase of the Plaintiffs’ copyrighted works is done by the Defendant University, by its agents or by its students.

\textit{Second}, the reasons initially put forward by the judge for ruling out §52(1)(a) were that the specific law [§52(1)(i)] should override the general [§52(1)(a)]. However, no explanation is offered for why the advancement of technology make this principle expendable.

\textsuperscript{74} \textit{Id.}, ¶75.
\textsuperscript{75} \textit{Id.}, ¶78.
\textsuperscript{76} \textit{Id.}, ¶76.
\textsuperscript{77} \textit{Id.}, ¶75 (He also quotes with approval The Williams & Wilkins Co. v. United States, 487 F 2d 1345 [affirmed by the US Supreme Court, 43 L Ed 2d 264 : 420 US 376 (1975)] and Re: The Supply of Photocopies of Newspaper Articles by Public Library, 2000 ECC 237, though he does not explain the relevance of either to the present case).
\textsuperscript{78} \textit{Id.}, ¶73.
\textsuperscript{79} \textit{Id.}, ¶89.
\textsuperscript{80} \textit{Id.}, ¶73.
\textsuperscript{81} \textit{Id.}, ¶43.
Third, the act of students making copies of copyrighted works from library titles cannot be so glibly extended to the Defendant University itself. This is because the shift in focus from student to university is not a mere shift in the mode of carrying out a permitted action. It is also not a case where the result or effect, though formally the same - in that the copies of copyrighted works are being made in both cases - is not the same in any practical sense.

Instead, it is a shift in the very identity of the actor carrying out the action, the resources at its disposal to make, distribute and sell copies, and even its incentives in making these copies available to teachers in its employ and students on its rolls. It is a grave leap in reasoning to insist that students copying out by hand parts of copyrighted works held by university libraries is no different from universities making or arranging to make thousands of copies of copyrighted works from their libraries without the rights-holders’ permission and distributing them to their students, in exchange for consideration or for profit.

The Court does, however, offer a more powerful defence for protecting the actions of the students and the Defendant University. It argues that the recognition that it does not confer absolute ownership to rights-holders of their works is built into copyright law. (This is preceded by a declaration that literary copyright is “not an inevitable, divine or natural right”82 – a newsworthy quote but one which only deepens the confusion about the Court’s stance on natural copyright.)

In doing so, it points to §14(a)(ii), which attaches an exclusive right for rights-holders to issue copies of copyrighted works to the public, which are not copies already in circulation. The Court reads the provision in reverse - not as a rights-conferring provision but as a limiting provision. Accordingly, §14(a) (ii) can be read as restricting rights-holders’ rights in copies that have already been sold and are ‘in circulation’. In legal terminology, this is an ‘exhaustion of rights’, that is to say, the rights-holder has extracted all permissible value from a work and its rights in the work thus stand exhausted.

This interpretation is appealing, and not just because it has been previously legally approved in India.83 It certainly appears to support a balance between the rights-holders’ interests and public benefit in a manner that has the judge’s approval.84 However, the judge does not probe this further. He simply returns a finding that the Defendant University’s act of making course packs

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82 Id., ¶80.
from extracts of the Plaintiffs’ copyrighted works, making further copies of these and distributing these to students does not constitute infringement.85

**H. EXTENDING THE EXCEPTION TO AGENTS**

In determining the fate of the arrangement between the Defendants, the Court sets out some important facts. It describes the relationship between the Defendant photocopier and Defendant University as follows:86

(i) The University grants a license to the photocopier to set up shop inside the university premises;

(ii) The University supplies the master copies/course packs to the photocopier;

(iii) The photocopier gives the University 3000 pages of photocopies per month free of charge; and

(iv) The photocopier makes and sells copies of the course packs to the University’s students for profit.

The Court finds that *none* of these activities, individually or in combination, constitute copyright infringement. It does so for two reasons.

First, it holds that there is no difference between copies made on photocopying machines installed within university libraries, and those made outside.87 In effect, this takes the Court’s own previous and highly questionable reasoning on §52(1)(a), in the context of permissible photocopying by universities, and extends it even further to copies made in physical spaces that need not even be in the knowledge of the University, let alone within its control.

This is propped up by a weak parallel with in-house legal libraries in Indian courts. The Court’s suggestion that the Defendants’ actions are no different from Court libraries from where advocates photocopy copies of judgments, is off the mark, because the works and rights-holders involved in the two cases are vastly different. It is also important to note that the Court had been presented clear evidence that the Defendant photocopier was photocopying in bulk from the Plaintiffs’ copyrighted works that had been borrowed from the Defendant University’s library.88
Second, the Court finds, extending the potential actors involved even further, that whether the University permits the photocopies to be made by itself through its employees, by its licensee or contractor for profit or by students either themselves or via a third party is irrelevant, since all these acts are non-infringing.\textsuperscript{89}

These reasons truly stretch the limits of possibility. The law does not say that all photocopying for academic purposes is permitted, but the Court’s finding is legally indistinguishable from this position. Critically, \textit{all of the weaknesses in reasoning pointed out at Part II.F, above apply to all the acts of the Defendants.}

Most pertinently, this cannot be said to be merely a shift in the mode of carrying out a permitted action. Surely, the Court cannot be suggesting that the acts of commercial photocopiers located outside these universities, who the universities have no connection with, who are handed course packs by students and proceed to photocopy them \textit{en masse} and sell these copies for profit, constitute fair use “by a teacher or a pupil in the course of instruction”,\textsuperscript{90} with neither teacher nor university anywhere in sight. Yet, incredibly, it appears to do so.

Equally, given that the photocopier (or the University, as its licensor) \textit{sells} these copies to students and makes profits, it appears that at a bare minimum, this constitutes acts done with a ‘commercial element’ under §51, which the Court ruled that rights-holders could object to \textit{even though these acts are not covered under their exclusive rights}. Even if this state of affairs is seen to not include a commercial element, it may well become a cause of action for copyright infringement as it amounts to “distributing any infringing copies of the work]…to such an extent as to affect prejudicially the owner of the copyright” under §51(b)(ii). It is difficult to see how these errors are not fatal to any prospect of saving the Defendants’ activities under §52.

“The [Defendant photocopier],” Mr Justice Gambhir had said in a previous interim order in October 2012, “has no right to compile such

\textsuperscript{89} University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 5128 : (2016) 233 DLT 279, ¶86 (There is some confusion over whether the Defendants themselves supported this position. At one point, the summary of their arguments recorded by the judge shows that they argued that if the act was non-infringing when done by the principal, it should not be infringing when done by its agent, relying upon a dissenting opinion in Princeton University Press v. Michigan Document Services Inc., 99 F 3d 1381 (6th Cir 1996). However, at a different point in his summary of arguments, the judge records that the Defendants’ submission was more limited. The Defendants had relied on the parliamentary debates on the 2012 copyright amendments to support the view that the use of copyrighted material for private study by students or teachers should be permitted); University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 5128 : (2016) 233 DLT 279, ¶15(vi) and (xxiv) & 19(I).

\textsuperscript{90} Copyright Act, 1957, §52(1)(i).
course packs and books/articles published by the Plaintiffs and, more so, when [the Defendant University] has taken a stand that that they have no intention to breach any law by making such reproductions as complained of by the [Plaintiffs] in the present suit.”

In this context, the contrast with the final conclusion could not be more telling.

I. RESTRICTION TO COURSE PACKS ONLY?

The latter part of the judgment is conspicuous for one reason in particular. The judge goes to great lengths to clarify that his findings are limited to course packs in the present case. He adds that it is only if the photocopier was photocopying a complete work of the Plaintiffs and selling it at a price competing with the Plaintiffs’ price for the original could it be said that the photocopier or university is functioning commercially.

According to him, this rules out the possibility of the Defendants competing with the Plaintiffs as sellers of the same books. However, he fails to take into account the unquestionable commercial nexus, on facts, between the University and the photocopier, with the Defendant University encouraging students to purchase the course packs instead of the Plaintiff’s books.

Even so, the judge correctly notes that the ultimate consumers in this case – the students – would likely not be first market consumers of the works since they are unlikely to be able to afford them. Their alternative, he reckons, would be to copy out these works the old-fashioned way – an outcome that he rightly dismisses as ridiculous in this day and age. These bits of characterization of the Indian market for academic texts do not invite disagreement in isolation. However, they do reveal a fundamental lack of understanding of how this market works.

Given the ubiquity of photocopying devices and services today, it is hardly a stretch to say that it is the photocopier that is the centre-piece of the market. As such, it is a mistake to cast this as a choice between each student individually buying numerous expensive texts, and each student individually painstakingly copying out all relevant texts. This is because neither scenario accounts for the reality that the photocopier exists.

91 University of Oxford v. Rameshwari Photocopy Services, CS (OS) 2439 of 2012 (Del) (Unreported) (October 17, 2012).
93 Id., ¶¶87-88.
94 Id., ¶87.
95 Id., ¶¶87, 89.
96 Id., ¶87.
Even taking the rights-holders’ best case, it is likely that there will be a lot of §52 photocopying by students. However, permitting photocopying in the terms that the judge has permitted (and failing to fix a limit on permissible photocopying) creates the very real possibility of a second market for copyrighted works photocopied in full.97

To attempt to defend this by saying that the price of the photocopier would not compete with the price of the rights-holder is inapposite. Of course the prices would be different – the photocopier’s version of a copyrighted work would be cheaper. If anything, it would make a purchase of the photocopied work by a student with limited resources more likely. Once this prospect exists, the rights-holder automatically has lost profits to realize. Asserting that students cannot afford these texts, without an analysis of relative prices, spending power and buying patterns, does nothing to dent the possibility that students would buy cheaper, photocopied versions of the same works.

In simplistic terms, this would be piracy – and an outcome that is hugely worrying for the Indian copyright system. More worrying still is the damning outcome that none of the judge’s reasons for permitting photocopying of course packs, do not also extend to photocopying of whole copyrighted works.

It could nevertheless be argued that the judgment does not authorize the photocopying of entire copyrighted works.98 This is based on the fact that the judge himself repeatedly acknowledges that his findings are restricted to the course packs before him. Therefore, it is contended, the findings cannot be extended to cases where photocopying of entire copyrighted works is being carried out.

This is disingenuous as the real question is not whether the judgment is chained to the facts of the case but whether there is anything in the reasoning to constrain its application just to course packs. The judge holds that the Defendants’ acts of photocopying are covered by §52(1)(i). It is also not in dispute that there is no qualification to the reasoning.

Nowhere does the judge hint that there is a threshold on the percentage of the works being copied, which, if crossed, would constitute infringement. The only percentages discussed by the judge are in recanting the parties’ submissions.

The closest that the judge comes to addressing this is in concluding that since the Defendants are not photocopying entire books and offering them for sale, they are not price competitors of the Plaintiffs.

97 This, too, was a fear raised by the Plaintiffs during the course of arguments. Id., ¶20(X).
98 Ananth Padmanabhan, Reading it wrong, The Indian Express (New Delhi) October 14, 2016.
Taking this at face value, two possibilities arise. One, future photocopiers can make and sell a product that is a full book for all intents and purposes but excludes some superficial portions. Since it is not an *entire* book, it escapes the judge’s price competition net and is fully authorized for sale under §52(1)(i). Holding this against the light of the judge’s formulation, a truncated product such as this would not be a price competitor to the rights-holder. This only exposes the hollowness of the reasoning, since a product like this (sold at a fraction of the cost of the original) effectively substitutes for the original in the vast majority of cases, if not all of them.

Two, even if the entire book is copied and sold by the photocopier, what part of the judgment prohibits it? Put differently, if the photocopier’s product is a price competitor for the rights-holder, does it automatically become an act of infringing? Adopting the judge’s intuitions, the answer should be no. This is because the sole criterion for applying §52(1)(i) is whether the copying is in the course of instruction. It has nothing to do with the relative prices of the copy and the original. Indeed, there is nothing at all that ties the ‘course of instruction’ exception to the price of the copy. Why, then, has the Court formulated this price competitor conjecture? Did the Court feel that price competition, whether alone or in combination with other factors, could tip the scales and render a product infringing? If so, why did it not say so explicitly? The judgment does not advance a solution on this issue.

**J. FINDINGS ON INTERNATIONAL COVENANTS & AUTHORITIES**

Lastly, the judge moves to consider international covenants on which the Plaintiffs placed reliance, notably the Berne Convention. The judge recognizes that the principle contained in Article 9 of the Berne Convention is binding on India. This means that India must ensure that unauthorized reproduction “does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

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99 It is, of course, possible to argue that this ‘entire book’ standard is legally flawed since a chapter or extract of a book – and not the entire book – constitutes a “literary work” *in itself*, within the meaning of §2(1)(o). Thus, a course pack or other condensation of an entire book would be a literary work. Applying this conversely, an entire book would also be a literary work, and if the judgment fully protects the untrammelled reproduction of one type of literary work under §52(1)(i), it should also permit such reproduction of another.


101 *Id.*, ¶95.

102 Berne Convention, Article 9(2); *Id.*, ¶92.
The judge then quotes extensively from WIPO’s Code to the Berne Convention:\(^{103}\)

“If the first condition is met (the reproduction does not conflict with the normal exploitation of the work), one must look and see whether the second is satisfied. Note that it is not a question of prejudice or no: all copying is damaging in some degree; a single photocopy may mean one copy of the journal remaining unsold and, if the author had a share in the proceeds of publication he lost it. But was this prejudice unreasonable?

… [In the example] of a lecturer who, to support his theme, photocopies a short article from a specialist journal and reads it to his audience; clearly this scarcely prejudices the circulation of the review. It would be different if he had run off a large number of copies and handed them out, for this might seriously cut in on its sales. In cases where there would be serious loss of profit for the copyright owner, the law should provide him with some compensation (a system of compulsory licensing with equitable remuneration).

Most countries allow a few photocopies to be made without payment especially for personal or scientific use, but expressions of this sort leave a lot of latitude to legislators and the courts.”

The last sentence is instructive. The latter part of it in particular, with the use of the words ‘but’ and ‘latitude’ in contrast with the words ‘a few photocopies’ compels the sentiment that free use should not just be restricted to a few free photocopies, that the latitude should be use to enhance room for free use. The judge highlights, further, that the Berne Convention mandate must be executed in a manner that “make[s] appropriate measures best adapted to [each country’s] educational, cultural and social and economic development”.\(^{104}\)

However, instead of budgeting for the “unreasonable prejudice to the legitimate interests of the author”, the judge simply brushes aside any need for this altogether, saying that such concerns are deemed to have been accounted for in the drafting of the Copyright Act.\(^{105}\)


\(^{105}\) Confusingly, the judge simultaneously insists that the purpose of teaching and unreasonable prejudice to the legitimate rights of the rightsholder cannot be a base on which to interpret the
This is completely mystifying. The judge does not explain how these standards have been accounted for in the text of the fair dealing provisions. He does not explain how evolving considerations such as prejudice to authors, which have undergone tectonic changes since the popularization of photocopying, can be retrofitted into the text of a provision [§ 52(1)(i)] that remains unaltered since its incorporation, prior to the advent of mass photocopying, in 1957.

Critically, he completely ignores §51(b)(ii), which uses the words “to such an extent as to affect prejudicially the owner of the copyright” – language so unmistakably close in tenor to Article 9(2) that it surely cannot have been incorporated oblivious to the Berne Convention. If the judge is right and the Copyright Act does account for considerations highlighted in the Berne Convention, why ignore a provision in the Act that so unmistakably bears the stamp of those very considerations?

Further still, he does not defend against the Article 9(2) standard, his interpretation of §52(1)(i) which, by any measure, is extremely broad. He does not explain how it does not cause unreasonable prejudice to the legitimate interests of the author, something courts explicitly have latitude to do, going by a passage that the judge himself isolated and quoted from.

In light of the facts, the complete absence of a defence to this interpretation is exigent. Thus, having settled upon a view of §52(1)(i) that, with no difficulty, permits large scale photocopying of academic texts by academic institutions, photocopiers and students, the judge does not discuss the impact it is likely to have on copyright holders, which he recognizes as a legal mandate under the Berne Convention. This is a staggering omission.

A defence of this position could have suggested a go-between which reasonably prejudices rights-holders’ legitimate interests. It could have attempted to minimize this prejudice. It could even have suggested that the legitimate interests to be protected are those of the author, and not the publisher. The position taken by the judge – that “[o]ur legislators…are deemed to have kept the said international covenants in mind”106 – is none of these things. It appears to be a disappointing cop-out.

Additionally, on the simple point of a comparison of equivalent provisions and precedents from other countries, the judge’s reticence is dismaying. Convinced that he has properly appreciated the provisions of the Indian statute, the judge simply sees no need to further discuss foreign authority. To put forward but one option available to the Court, it could simply have compared

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Id., ¶97.
the Indian law with §32 of the UK Act.\textsuperscript{107} §32 provides a fair dealing exception for copies of literary works made “in the course of instruction” – probably the closest foreign equivalent to §52(1)(i)(i).\textsuperscript{108} The UK Act also restricts such copies to: (i) copies made by a person giving or receiving instruction; (ii) copies made by a photocopier and (iii) copies accompanied by an acknowledgement, provided that the instruction is for a non-commercial purpose.\textsuperscript{109}

These conditions were incorporated into the UK Act by amendments in 2003. The Indian Act, on the other hand, was last amended in 2012, with full knowledge of the UK amendments, and nevertheless chose to retain the text of §52(1)(i)(i) as it is.

A similar comparison could be made with §28 of the Australian Copyright Act (acts permitted “in the course of educational instruction”), §§44(1) and (2) of the New Zealand Copyright Act (conditions under which copying is permitted “in the course of instruction”),\textsuperscript{110} §§29.4(1) and 30.3(1) and (2) of the Canadian Copyright Act (“reproduction for instruction” and non-infringing photocopies made on machines “installed by or with the approval of the educational institution…on its premises for use by students, instructors or staff”) and §12(4) of the South African Copyright Act (non-infringement of copyrighted works used by way of illustration in teaching).

All of the aforementioned provisions, suggest that §52(1)(i)(i), which contains none of these restrictions - even though the option to incorporate them was open to the legislature - does so intentionally and is, therefore, to be interpreted broadly.\textsuperscript{111}

III. QUESTIONS LEFT UNADDRESSED

Controversial findings aside, the judgment has also left a number of critical questions regarding the case entirely unaddressed.

\textsuperscript{107} This was a comparison urged by the Plaintiffs but not taken up by the Court. \textit{Id.}, ¶14(l).
\textsuperscript{108} This is not all that surprising, considering the current §52(1)(i), which has stayed unchanged since the Indian Act was brought into force in January 1958, was based substantially on §41 of the UK Copyright Act of 1956.
\textsuperscript{109} UK Copyright, Designs and Patents Act, 1988, §§32(1)(a)-(c).
\textsuperscript{110} The Plaintiffs did, in fact, rely on a New Zealand High Court decision in Longman Group v. Carrington Technical Institute, (1991) 2 NZLR 574, but this was not considered by the Court. University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 5128 : (2016) 233 DLT 279, ¶18(xliiv).
\textsuperscript{111} This conclusion was hinted at by the intervening Defendants, though without the reliance on equivalent foreign provisions. University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 5128 : (2016) 233 DLT 279, ¶15(liii).
A. ARE THE COURSE PACKS BEING DISTRIBUTED COMMERCIALY?

The most crucial question in this list is that of whether the Defendants’ acts were commercial in nature. This is significant because two important legal conclusions are deeply tied to the finding that the Defendants’ course packs are not commercial in nature – the basis for distinction between the types of acts considered infringement under §51, and whether there exists price competition between the parties.

Yet, the facts themselves have not been examined by the judge despite the issue being extensively contested by the parties. The Defendants, perhaps aware of the difficulty in circumventing the fact that the students were being charged for course packs, looked to distance themselves from the commercial nature of the transactions. At one stage, the Defendant University offered to undertake not to photocopy with commercial motives.112 At another, it was claimed that the price per page for the photocopies made by the Defendant photocopier was a binders’ charge and that there was no commercial angle at all.113 At yet another, the Defendant University offered to distribute course packs only to students with valid ID and not to permit the Defendant photocopier to profit more than a tiny fraction per page of copy.114

The Plaintiffs contended that the course packs were not unconnected photocopies – they were being sold like books.115 They suggested that the Defendant photocopier was charging a rate higher than market price for the course packs,116 and that the Defendant University had every incentive to have its licensee do better business.117

A finding on this issue would have provided a standard for judging the boundaries between types of fair dealing which are commercial to some degree. A preliminary finding would have sufficed, while more evidence on these competing claims could have awaited trial. In not returning any finding at all, and dismissing the suit without a trial, the Court falls well short of what it was required to do, with respect to this crucial question.

112 Id., ¶18 (xxxviii).
113 Id., ¶16(b).
114 Id., ¶18(lvi).
115 Id., ¶20(l).
116 Id., ¶14(f).
117 Id., ¶14(zm).
B. IS A SUBSTANTIAL PERCENTAGE OF THE PLAINTIFFS’ WORKS BEING COPIED?

As expected, in the absence of formal evidence being led, the parties clashed factually even on how much of the Plaintiffs’ copyrighted works were being reproduced. The Plaintiffs initially claimed it was between 5% and 33.25%. They later suggested that the appropriate method to determine this was before the Indian Copyright Board and that the IRRO would permit up to 15% copying, if the licensing terms were acceptable to the Defendants.

The Defendants challenged these numbers. They claimed that while the numbers of all works copied varied from 1.62% to 30.09%, the course packs which had aggrieved the Plaintiffs only reproduced between 7.3% and 19.5%. This, they argued, was a miniscule amount, given that foreign precedent supported the view that even a 10% excerpt would not substantially damage the market for the copyrighted work.

Perplexingly, the Defendants appear to have, at various points, contended that the actual amount of copying had to be judged quantitatively (as above), qualitatively in exclusion to the amount copied, and also said that the amount copied is irrelevant so long as the purpose is educational. Equally oddly, they also appear to have adopted contradictory stances about the effect of the copying on the marketability of the Plaintiffs’ works, arguing at different times that it is the only relevant factor under §52(1)(i), only to later argue that it was not. The entirety of the Court’s response to these immensely detailed submissions is as follows: “…[W]e have before us the range of percentage of the contents from each book being photocopied and included in the course pack. No evidence to that effect is required.”

This does not answer either the question of whose numbers as to the quantum of photocopying are accurate, nor does it answer the question of whether such copying is substantial. Indeed, the question of what effect such copying would have on the Defendants’ fair dealing defence, is also left unaddressed.

118 Id., ¶14(zn).
119 Id., ¶20(V).
120 Id., ¶20(IV).
121 These numbers oscillated to between 8% and 10% elsewhere in their submissions. See id., ¶15(xv) and 18(xxx).
122 For this purpose, they relied on Cambridge University Press v. Mark P. Becker, 863 F Supp 2d 1190 (ND Ga, 2012). Id., ¶15(iv) and (xvii).
123 Id., ¶15(xx).
124 Id., ¶15(xiii) and 18(xiv).
125 Id., ¶15(xviii).
126 Id., ¶15(xxi).
127 Id., ¶22.
Not only is the percentage of the work photocopied, frequently used as a legal benchmark to distinguish between copying that is infringing and non-infringing, but also it would have been useful to have a finding on this issue, so as to interact with the Plaintiffs’ contentions regarding the likelihood of damage to their business model. As such, the Court’s reluctance to rule on this issue is deeply disappointing.

C. THE DOOMSDAY SCENARIO

The fear underpinning the Plaintiffs’ case was that permitting photocopying by the Defendants in the manner that the Court was minded to do would gravely affect the business of publishing educational texts for Indian consumers. The Plaintiffs’ submission that permitting the Defendants’ acts to do so would replace the need to buy books, was opposed by the Defendants’ view that the students who need to benefit most from these works cannot afford them at their current prices.

The judge did address this problem in part, agreeing with the Defendants on the lack of affordability of the Plaintiffs’ works. However, the more pointed question before the Court was of exactly what the economic impact of permitting the Defendants’ actions would be.

Two key clashes occurred on this issue. The first was about the number of buyers, if any, would be swayed as a consequence of photocopying of this nature being permitted and at what point this crossover would occur. Here, the Plaintiffs insisted that the Defendants were in competition with them; the Defendants insisted that serious buyers would continue to buy the Plaintiffs’ works.

The second was of the hard financials of the case itself, in terms of losses caused to the Plaintiffs, the licenses the Plaintiffs wanted the Defendants to take, in addition to the Defendants’ claims that the purchasing power of students was low and the cost of books adjusted for income levels was extremely unsustainable.

Once again, the Court did not offer a factual finding. Given that it was charged with disposing of applications seeking interim relief in the suit, its decision to close the suit by simply returning a verdict on infringement without leading evidence on the aspect of economics involved, is strange. It is

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128 See, e.g., New Zealand Copyright Act, 1994, §§ 44(3) and (4).
129 University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 5128 : (2016) 233 DLT 279, ¶14(za), (zj), (zq), (zr) and (zt), 20(VII) and (VIII).
130 Id., ¶14(h), 15(x), (xvii) and (xxxii) and 20(XI).
131 Id., ¶14(d) and (p), 15(iii), (xii), (xl) and (xliii) and 18(xlii).
132 Id., ¶101-102.
especially so, considering the Defendants’ own insistence that the quantum of damage caused to the parties and the degree of copying involved were factors on which evidence was needed.\(^{133}\) To this could comfortably be added issues such as price comparisons, spending power, purchaser profiling and preferences, crossover points, university licensing arrangements and economic details of the publishing business.

More perplexingly, nowhere does the Court explain how this suit is different from any other suit for copyright infringement, where distinct stages such as the interim injunction, evidence at trial and final arguments with evidence constitute the norm.

D. THE ECONOMICS OF ACADEMIC PUBLISHING

Thus, the judgment is unhelpful in offering even a basic sketch of the economic factors that govern the Indian market for academic texts. It is left to the reader, then, to cobble together a hopeful approximation of the judge’s view of the economics at work. In this sub-part, I tender a simplistic outline of my own, with the aim of raising some critiques and, hopefully, presenting a fuller picture to better place the judgment in proper context.

There can be little disagreement over the fact that quality editing, exercising and leveraging sales and distribution networks and author commissions and royalties are steep expenses for publishers. Publishers recoup this outlay in India predominantly through sales and licenses. Presently, the overwhelming majority of the market for academic texts, especially foreign texts, is academic institutions, and not individual students.

Mass photocopying, the stock-in-trade of photocopiers like the first Defendant in this case, has two effects. First, it ensures that a book can be transferred from the published page to the photocopied page with no loss of academic quality. Second, it makes the use of these books fundamentally and aggressively non-rivalrous. For instance, if there are two users who want to access an extract from a single copy of the book at the same time, aside from the amount of time taken to photocopy the extract, there is no impediment to one book serving the academic needs of both users. Further still, if that extract is included in the course pack, the need of either user for the book disappears entirely and permanently.

From here, it is no hardship to conclude that if academic institutions are permitted to make, distribute and sell multiple copies of an individual book, it makes them less likely to be repeat purchasers. This state of affairs protects everyone but publishers and authors.

\(^{133}\) *Id.*, ¶15(xxi).
Academic institutions are able to purchase fewer copies of the same title. They can recover some of their outlay on original books through licensor fees earned from photocopiers and a percentage of profits from course pack sales, if applicable. They are also able to defray sundry expenses by continuing to charge students library access fees.

It protects the licensed photocopiers themselves. In exchange for the licensee fees, they are given access to a defined (and frequently growing) demand for course packs to be charged at set rates beyond the university’s maximum free page allowance, in addition to *ad hoc* photocopies which are charged at market rates. It protects the students as well, since they do not need to spend on purchasing books. They are given access to course packs either as handouts or at fixed rates per page. However, for the publishers (and, filtered through the sieve of royalties, the authors), the loss occurs in two ways.

*First*, it kills the incentive of academic institutions to purchase multiple copies of the same title. Legalizing mass photocopying means that institutions that would have purchased, say, twenty copies of a title, can now purchase as few of those titles as are necessitated by the limitations on the number of photocopying facilities available to its academic users. For this not to occur, it needs to be established that there is a unique, irreplaceable value to reading a relevant extract from an original book rather than from the same thing in a course pack.

*Second*, it also dissolves any remaining reason for the few individuals who were previously purchasing these titles from the publisher to continue doing so. This is because what they need of these texts to fulfill their academic obligations is offered to them for a tiny fraction of the cost of the book. Once again, to disprove this, some unique value to owning and enjoying exclusive rights over an original text (aside from merely convenience, since a user does not need to photocopy an extract from a book she already possesses) must be demonstrated.

The only other room to argue that the publishers’ economics will not be affected is to assert – and an assertion is all it can really be – that the demand of academic institutions or individuals (or both) for original titles will not fall because course packs are not exhaustive of an academic user’s need for these titles. If multiple copies of these titles are needed in academic libraries or are likely to be purchased by individuals so that they can access parts of the text that are not extracted in course packs, it could be said that the fall in demand may be offset to a degree.

However, for this to be tenable, there needs to be a sharp rise in such putative users, something the Indian higher education system to much
consternation, clearly lacks. Even if this becomes a front-and-centre goal of the system, it is hardly fair to expect publishers and authors to design their economic sustenance around the assumption that Indian students will want to read beyond what they are required to for class.

Finally, much has been made of the motivations of publishers in pursuing actions like this. Understandably, there are concerns over the whys and wherefores of how an organization like IRRO would negotiate a deal between publishers and academic users. (An IRRO license of course is, by the Plaintiffs’ admission, their best case scenario in this case.) However, this is still a conversation on how rather than whether a licensing agreement can be administered. It cannot be used to justify throwing out the Plaintiffs’ case entirely because all photocopying in the course of academic instruction is fair dealing, not worthy of recompense.

Beyond this, the only advancement offered for the Defendants’ position has been that the Plaintiffs, being locked out of what is effectively a lucrative second seller market, want a share of the pie. Even if true, set against the losses likely in the first seller market discussed above, surely this is a question that falls to be determined on a spectrum of economic viability rather than being cast as a lazy allegation, which simply plays to the “profit-maximizing publisher” stereotype.

IV. CONCLUSION

The initial academic reaction to the decision has, predictably, been united in its acknowledgement of the game-changing nature of the judgment in the marketplace for academic works in India, if the judgment is given full effect. On merits, however, feedback has been split.

For every view offering reasons why academic publishers will not be in economic trouble even if photocopiers are allowed to make course packs, attention has been drawn to how the lack of quantitative limits on permissible copying kills economic incentives for authors and publishers putting out new work. For every explanation of how an academic culture that aggressively promotes course packs intellectually handicaps students going forward, there has been a response replacing this fear of intellectual stagnation with an equally potent fear of further limitations on student access to quality works which would cause the same stagnation in a different way.135

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134 K. Kumar, Shortcut to Scholarship, The Indian Express, October 11, 2016.
135 Id.; Padmanabhan, supra note 98; S Deshpande, Copy-wrongs and the Invisible Subsidy, The Indian Express, October 7, 2016; S Basheer, Copyright as Exception, The Indian Express, October 19, 2016.
Predictably, the Plaintiffs have appealed the judgment, though they have been unsuccessful in preventing the effect of the order in the interim. The Defendant photocopiers have, however, been directed by the Division Bench of the Delhi High Court seized of the appeal, to maintain accounts of their business, as a backstop for a future costs estimate, should their defence be unsuccessful. The Division Bench has, as of November 29, 2016, ordered the case to be heard day-to-day, and has endeavoured to render an appellate ruling by the end of 2016.

Thus, as the Delhi High Court’s time with the dispute hastens to a close, it is clear that the judgment the Division Bench sits in appeal of has some rather prominent limitations. It could still be argued, however, that the bottom line of treating photocopying of copyrighted academic texts is still extremely defensible. This is especially true given the lack of restrictions in the Act. At a broader level, it is also true that the objective of any such decision should be to ensure that students with limited means are not paying over the odds for access to quality academic works.

Without a meaningful legal interpretation of fair dealing to prop it up, though, the entire effort is compromised. The problems begin with the Court’s approach to the theoretical foundations upon which it locates the fair dealing exceptions. Even casting aside the statutory copyright versus ‘natural’ copyright debate as an unnecessary complication in view of §16, the reading of §§14 and 51 provides theoretical difficulties that are harder to overcome.

As discussed at Part II.A, a combined reading of these sections suggests the possibility of copyright infringement outside the rights-holders’ exclusive rights. More pointedly, it suggests that not all space outside the rights-holders’ exclusive rights is accessible to parties, who are seeking to bring their otherwise infringing actions into the purview of legality. However, adjusted for scale, these are less impactful on the outcome upheld by the judge, than the interpretation of academic fair dealing.

The judge’s reading of §52, of course, is where the difficulties are most pronounced. The principal stumbling block is that the judge does not commit to a position as to which provision -whether §52(1)(a) or §52(1)(i) - is applicable to the Defendants’ actions. One possible way to reconcile the situation would have been to argue, as the intervening Defendants did, that there is a relationship between §§52(1)(a) and (i).

It is possible to think of §52(1)(i) as, in some way, a subset of §52(1)(a): take away the applicability of sub-clause (i) and the Defendants’

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136 University of Oxford v. Rameshwari Photocopy Services, CS (OS) No. 2439 of 2012 (Del) (Unreported) (October 6, 2016).
actions would still be protected by sub-clause (a). This construction is not without difficulty since there is no language in sub-clause (a) that leaves room for a subset hypothesis. However, it is certainly preferable than concluding, as the judge has done so extraordinarily, that sub-clause (a) categorically does not apply, because it is not specific enough, but later find that it does apply to some degree.

The other issue is the judge’s elucidation on §52(1)(i). In addition to the objections already raised at Part II.F above, the Court still needed to overcome the Defendants’ own case that their actions were commercial in nature.

Indeed, the Defendants own case was that the distinction between sub-clauses (h) and (i) of §52(1) is that the former saves commercial use, whereas the latter saves non-commercial use. In upholding that §52(1)(i) was applicable, the Court astonishingly went beyond the best case of the party in whose favour it ruled.

The final limitation in the Court’s findings, and one which shone a bright light on the §52(1)(i) interpretation, was its lack of engagement with similar provisions appearing in statutes around the world. Even accepting the judge’s dismissal of the relevance of Article 9 of the Berne Convention (which, remember, the Defendants relied on as well), it is extremely difficult to defend his complete disavowal of foreign authority. This becomes even more pronounced with even a cursory look at the numerous possibilities that this could have opened up for discussion, as outlined at Part II.J. above. In fact, so averse was the judge to looking at foreign authority of any kind – including those on which the parties placed detailed reliance – that he noted that the incorporation of references to foreign judgments was not for any meaningful purpose but was “only to demonstrate diversity”.

It is a peculiar way to close out a peculiar judgment. For all the plaudits that the judgment has received for its pro-student outcome, it has undoubtedly thrown into considerable doubt the sustainability of the legal positions it has advanced. The Indian law on academic fair dealing exceptions would be well served by a swift and decisive reconsideration.

139 Supra Parts II.D and II.G.
141 The Defendants also relied on Article 26 of the Universal Declaration on Human Rights to set up education as a universal human right. Id., ¶18(xxi) and (lii).
142 Id., ¶100.