

Copyright exceptions for educational institutions under the Indian copyright Act, 1957

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Abstract

The impact of copyright law on educational establishments has become a matter of debate over recent years. The never-ending tussle between the copyright owners and the users has reached a new height with the technological advances in making copies of the copyrighted works. On the one side, copyright owners want to protect their rights against unauthorised copying. On the other side, educational institutions want the advantage of making copies of copyrighted works. In India, sections 52 and 39 of the Copyright Act, 1957 carve out certain exceptions referred to as 'certain acts not to be an infringement of copyright' and 'acts not infringing broadcast reproduction right and performer's right', respectively. This paper will attempt to critically analyse the copyright exceptions for educational institutions under the Indian Copyright Act, 1957.

Keywords: fair use, copyright exceptions, educational institution

Introduction

Copyright is one of the branches of the IPR and refers to a bundle of exclusive rights conferred on creators of original works. Copyright and education have a troubled history together. The use of copyrighted materials is inevitable in educational institutions. The copyrighted works promote learning and knowledge, and for this, the copyright law benefits authors by granting a temporary monopoly and, at the same time, ensures public access to the copyrighted works as works are protected for a limited time. However, access to work is required even during the duration of the copyright protection^[1]. The goal of learning cannot wait until the copyright term comes to an end.

Further, the creation of new works depends on the existing copyrighted materials as the new author relies upon such works to develop his expression. Other intellectual activities such as research and criticism require reference to the existing works. In this context, the ultimate task of the copyright law is to strike a fair balance between the author's right to control the dissemination of his creations and the public interest in seeking the wide dissemination of such creations [2]. Copyright law prohibits others from exploiting the works of the creators without their consent. However, for specific purposes, it permits the use of copyrighted works without the permission of the creator under what has come to be referred to as fair use, fair dealing, exceptions, limitations, restrictions or permitted acts in different national legislations. The copyright exceptions are required to strike the balance between access and incentives.

Copyright Exceptions for Educational Institutions under the Indian Copyright Act, 1957

There are certain acts that are specified in the law that can be done without the authorisation of the copyright owner and without paying any remuneration to the owner of the copyrighted works. Under the Copyright Act, 1957, section 52 (certain acts not to be infringement of copyright) under chapter XI deals with exceptions or limitations, *i.e.*, for which a formal consent of the author or owner of the work is not required for doing the activities mentioned in the

provision. Section 39 of the act provides for acts not to be infringement of broadcast reproduction right and performer's right. The provisions attempt to balance the exclusive rights of the copyright owner with the public interest in the free dissemination of all works.

The policy behind the copyright exceptions was explained by the Delhi High Court in the case of *Chancellor Masters & Scholars of the University of Oxford v. Narendra Publishing House*^[3]. *The court observed that:*^[4]

"The doctrine of fair use...legitimizes the reproduction of a copyrightable work. Coupled with a limited copyright term, it guarantees not only a public pool of ideas and information, but also a vibrant public domain in expression, from which an individual can draw as well as replenish. Fair use provisions, then must be interpreted so as to strike a balance between exclusive rights granted to the copyright holder, and the often-competing interest of enriching the public domain. Section 52 therefore cannot be interpreted to stifle creativity.... It, therefore, must receive a liberal construction in harmony with the objectives of copyright law. Section 52 of the Act only details the broad heads, use under which would amount to infringement. Resort, must, therefore be made to the principles enunciated by the courts."

Under section 52, there are a number of acts that can be done without the permission of the owner of the copyrighted works. The focus of this paper will only be on exceptions for educational institutions or exceptions that have a bearing upon the educational institutions.

Fair dealing of works for personal use or research

Section 52(1)(a)(i) provides that a fair dealing with any work (excluding computer programme) shall not constitute infringement for the purpose of private or personal use, including research.

Section 39 under Chapter VIII of the act dealing with the rights of broadcasting organisation and of performers is also couched in a similar way as section 52 of the act. Section 39(a) provides that the making of any sound recording or visual recording for the private use of the person making

such recording, or solely for purposes of *bona fide* teaching or research will not be an infringement of broadcast reproduction right or performer's right. It is clear that under this provision only making of recordings are permitted and not the use. For the use of such recordings, an individual will have to rely upon section 39(b) and such use has to undergo the test of fair dealing. Section 39(b) provides that the use, consistent with fair dealing of excerpts of a performance or of a broadcast in the reporting of current events or for *bona fide* review, teaching or research is also not an infringement.

Sections 52(1)(a) and 39(b) use the term 'fair dealing'. However, the term 'fair dealing' is not defined in the Copyright Act, 1957. The courts in India have relied upon the judgments of the courts in the UK and the USA. The observations of Lord Denning in *Hubbard v. Vosper*,^[5] have been relied upon by the courts in India to decide the cases of fair dealing. He observed that it is impossible to define fair dealing and it is a question of degree. Firstly, one must consider the number (too many) and extent (too long) of the quotations and extracts. Secondly, consider the use made- for comment, review or criticism and in case the quotations or extracts are used to convey the same information for a rival purpose then such use is not fair. Thirdly, consider the proportions- short extracts and long comment may be fair but the vice versa may be unfair. He further explained that the courts may take into account the other considerations but at last it is a matter of impression and it depends on the facts of the case^[6]. The courts have also relied upon the decision in *Ashdown v. Telegraph Group Ltd.*^[7] wherein it was observed that the defense of fair dealing depends on three factors whether it is in commercial competition with the work used; whether the work has been published or is otherwise available to them and the amount and importance of the work taken^[8].

The courts have also relied upon section 107 of the United States Code which provides the factors which have to be taken into account while determining whether the use made of a work in a particular case is fair use. These factors are the purpose and character of the use; nature of the copyrighted work; amount and substantiality of the portion used and effect of the use upon the potential market. It is apparent that there is no thumb rule in determining what constitutes fair dealing and it depends on the facts and circumstances of each case.

This exception is significant for the researchers in all the fields and the researcher may rely upon the copyrighted works for further study in the area. If this exception will not be there in copyright law, the researcher or an individual will have to waste time seeking permission from the owners of the copyrighted works for carrying forth their research or private study.

Use in the course of activities of educational institution

Sections 52(1)(i) and 52(1)(j) permit certain activities for the purpose of education. Section 52(1)(i) provides that the reproduction of any work shall not constitute an infringement of the copyrighted works if it is reproduced by a teacher or pupil in the course of instruction. Section 52(1)(i) is the most important exception as it allows the reproduction of any work by a teacher or a pupil in the course of instruction. In *Longman Group Ltd. v. Carrington Technical Institute Board of Governor*,^[9] the High Court of Auckland observed that:

"...course of instruction would include anything in the process of instruction with the process commencing at a time earlier than the time of instruction, at least for a teacher, and ending at a time later, at least for a student and that so long as the copying forms part of and arises out of the course of instruction; it encompasses preparation of material to be used in the course of instruction."

For the first time, the question related to the interpretation of section 52(1)(i) arose in *The Chancellor, Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services*^[10]. The plaintiffs, reputed publishers filed the suit for a permanent injunction. The plaintiffs sought that the defendants namely Rameshwari Photocopy Service (defendant no. 1) and the University of Delhi (defendant no. 2) be restrained from infringing the copyright of the plaintiffs in their publications by photocopying and by the sale of unauthorized compilations of substantial extracts from the plaintiffs' publications. The court dismissed the suit and concluded that the action of the defendants does not constitute infringement. In relation to section 52(1)(i) and its applicability to the facts of the present case, the court observed that:^[11]

"The scope and ambit of section 52(1)(i) cannot be restricted. Education in the country though at one time pursued in *Guru-Shishya* parampara (Teacher-disciple tradition) has for long now been institutionalized, both at school and post-school level, with imparting of education by a teacher individually having no recognition. There is no reason to interpret it as providing for an individual teacher and an individual pupil and which, neither at the time of inclusion thereof in the statute nor now exists in the society.... Thus, merely, because imparting of education by teacher today is as part of an institution...and it is...university which on behalf of its teachers is reproducing any copyrighted work by making photocopy would not mean that section 52(1)(i) would not be applicable."

The court clarified the meaning of the term 'instruction'. The court observed that the term 'instruction' with regard to a teacher would mean "something which a teacher tells the student to do in the course of teaching or detailed information which a teacher gives to a student or pupil to acquire knowledge of what the student or pupil has approached the teacher to learn."^[12] The court further observed that the course of instruction continues during the entire academic session and accordingly, the reproduction of any work by the teacher for imparting instruction to the students as prescribed in the syllabus during the academic year would fall within section 52(1)(i)^[13].

An appeal was filed against the decision of the single judge and the division bench passed the judgment in *The Chancellor, Masters and Scholars of University of Oxford v. Rameshwari Photocopy Services*^[14]. The court set aside the judgment of the single judge and held that there is a triable issue on fact. The court observed that for the purpose of teaching, the fairness in the use will be determined on the basis of 'extent justified by the purpose of education' and therefore, the extent of the material used both qualitative and quantitative would have no concern and so much of the copyrighted material can be used which is necessary make the learner understand what is intended to be understood^[15]. Accordingly, the suit was restored before the trial court. However, on March 9, 2017, the publishers withdrew the suit.

Section 52(1)(ii) and (iii) permit the reproduction of the copyrighted works as part of the questions to be answered in an examination or in answer to such questions. Therefore, if in a question paper the examiner quotes few paragraphs from the copyrighted work asking the student to analyse the same, it is permissible under section 52(1)(i)(ii). The student also while answering the question can quote from the copyrighted works under section 52(1)(i)(iii).

Section 52(1)(j) permits the performance of a literary, dramatic or musical work by the staff and students of the institution in the course of the activities of an educational institution or the communication of a cinematograph film or sound recording, if the audience is limited to such staff and students, the parents and guardians of the students and persons connected with the activities of the institution. This exception is wider in scope as the parents and guardians of the students can also constitute part of the audience.

Use by library

Sections 52(1)(n), 52(1)(o) and 52(1)(p) permit certain activities by libraries. Libraries play a significant role in developing countries in democratizing access to knowledge and are agents to address the issue of the digital divide ^[16]. Section 52(1)(n) permits the storing of a copyrighted work by a non-commercial public library for preservation in any medium by electronic means if the library possesses a non-digital copy of the said work. This provision was added by the 2012 amendment. Under this provision, the library is allowed to store the work for preservation but cannot reproduce or circulate the preserved work to the users.

It is not yet clear what actually constitute 'non-commercial public library' as the same is not defined under the act and it may be open to varied interpretations. Explanation to section 2(fa) provides that a non-profit library means a library that receives grants from the government or is exempted from payment of tax under the Income Tax Act, 1961. It can be discerned from various definitions in the state legislations regarding public libraries that it may mean a library that is constituted by the government or is receiving the funds from the government and is open for the members of the public to use for reference with or without charging any fee or subscription. However, it would be better if this provision is made applicable to all the libraries that are open to the public or to the researchers.

Section 52(1)(o) permits making of not more than three copies by or under the director of the person in-charge of a non-commercial public library of a book (including a pamphlet, sheet of music, map, chart or plan) for the use of library if such work is not available for sale in India. There is no definition of the term 'book' under the act. It is appropriate to substitute the term 'books' by the term 'works' so that this provision can be used widely by the libraries. Further, there is no clarity as to what exactly not available for sale in India means.

Section 52(1)(p) permits reproduction of an unpublished literary, dramatic or musical works kept in a library, museum or any other institution to which the public has access for the purpose of research or private study, or with a view of publication. However, if the identity of the author of the work or any of the authors in the case of joint authorship is known to the concerned institution, then the reproduction of such work under this provision is permitted only if it is made at a time more than sixty years from the date of the death of the author.

Special exception for persons with disabilities India has amongst the most progressive exception for persons with disabilities. India became the first country to ratify the Marrakesh Treaty on June 24, 2014. Even before the Marrakesh Treaty, by way of the 2012 amendment, sections 52(1)(zb) was inserted which carve out a specific exception for persons with disabilities ^[17]. The amendment also introduced a special provision of a compulsory licence for benefit of the disabled under section 31B of the Act.

Section 52(1)(zb) as inserted by the Copyright Amendment Act, 2012 permits the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format to facilitate persons with disability to access to works. These activities can be undertaken by any person to facilitate access to work for persons with disabilities including sharing with any person with disability for private or personal use, educational purpose or research. Further, under this provision any organisation working for the benefit of the persons with disabilities can undertake the activities in case the normal format prevents the enjoyment of such works by such persons. However, the copies of the works in accessible format should be made available on a non-profit basis just to recover the cost of production and the organisation shall ensure that the copies are used only by persons with disabilities and that such copies do not enter the ordinary channel of business. The explanation to the section clarifies the meaning of organisation. It includes an organisation registered under section 12 A of the Income-tax Act, 1961 and working for the benefit of persons with disability or recognised under Chapter X of the Persons with Disabilities (Equal Opportunities, Protection or Rights and Full Participation) Act, 1995 or receiving grants from the government for facilitating access to persons with disabilities or an educational institution or library or archives recognised by the Government. There is no definition of the term 'accessible format' under this provision, however, the explanation appended to the rule 77 of the Copyright Rules, 2013 provides that the term 'accessible format' shall include Braille, Daisy, large print, talking books, digital formats and all other formats that can be used by persons with disabilities. It is an inclusive definition and is wide in its scope. This provision envisaged that the activities can be undertaken by the disabled person for his/her own use and for sharing with others in the community; conversions by third parties, *i.e.*, individuals or organisations working for the benefit of the disabled on a non-profit.

Conclusion

In India, sections 52 and 39 of the Copyright Act, 1957 provide a closed-ended list of the permitted acts that will not amount to infringement even if the author's consent is not taken. The idea behind incorporating such exceptions was to serve the varied interest and balance the conflicting interest of the owners and users of the copyrighted works. While dealing with the cases on sections 52 and 39, the courts in India have accepted that it is not possible to define the exact contours of fair dealing, and it depends upon the facts and circumstances of the case. Factors like the motive of the user, commercial or non-commercial use of the work, amount of the work, the qualitative aspect of the work, transformative nature of the work, and public interest have been taken into consideration by the courts in India. Further, there is still a considerable amount of uncertainty

surrounding the scope and operation of some of the exceptions in India, as pointed out in the discussion above which requires legislative intervention.

References

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