

# DROIT PENALE: INDIAN LAW JOURNAL ON IPR

(A Unit of Droit Penale Group, Prayagraj)

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## PHOTOCOPY: A CIRCUMVENTION OF COPYRIGHTS

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### ABSTRACT

*The concept of fair use has acted as a means of utilizing copyrighted works without obtaining requisite licenses and payment of adequate licensing fees. However, it is debatable whether such use of copyrighted works for the purposes of teaching and student coursework shall amount to copyright infringement or can be considered acceptable under the fair use exception of copyright law. The author in this article has attempted to analyze the implications of photocopying works on the parties to whom the lawfully obtained copyrights of such works belong. The paper distinguishes and examines the rights and liabilities of different stakeholders in the discussed matter of conflict. The article in the for the purpose of the said analysis also examines the landmark judgement of *The Chancellor, Masters and Scholars of the University of Oxford v Rameshwari Photocopy Services* in which the court has for the first time elaborately dealt with issue of the act of photocopy amounting to copyright infringement of the original works while also dealing with the issue of making available extensive coursework from expensive books to a considerably large group of students can be effectively executed by providing photocopies of such coursework prepared from a collection of chapters or works of different books. The author in this article has attempted to address the issue and analyzed*

*the arguments put forward by all stakeholders like photocopy shop owners, publication houses, universities and students. The issue had direct effect on the education system and availability of feasible access of coursework to students at the same time honouring the rightfully obtained copyrights of publishers while harmoniously construing the exception of fair use to provide an amicable solution to all stake holders.*

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## INTRODUCTION

Quoting reporter Debika Ray, Al Jazeera, “To photocopy or not to photocopy university course material - that's the Hamletian dilemma many students are now confronted with in India.”<sup>1</sup> In a developing country like India, photocopy of published books forms an integral portion of study material for students, in the unavailability of which the education system in India will have to suffer dire consequences. In the landmark copyright infringement case, *The Chancellor, Masters and Scholars of the University of Oxford v Rameshwari Photocopy Services*<sup>2</sup>, popularly known as the Delhi University Copyright case, the issue of whether an act of prescribed Course packs made by compilations from various published and copyrighted works being distributed to students of the Delhi University as study materials from the syllabi for a nominal charge of photocopy shall amount to infringement of copyright of the publisher's came up. The case gained massive national and international attention from the legal fraternity owing to the important subject matter which affected national as well as international copyright as well as highlighted the rights of education and access to knowledge of students. Justice, Rajiv Sahai Endlaw, has observed that the essential jurisprudence behind copyright protection is not only to extend exclusive protection to the authors or creators but also strike a balance between the rights of the creator and the social benefit from the creativity in public interest. The two essentially legal questions that came up during the hearing of the issues were around the grounds that (a) Whether or not prior license agreements needed to be acquired by the defendant before photocopying and selling course packs and (b) whether an act of photocopying for preparing course packs for students amounted to infringement of copyright of the publishers or they are covered by the exceptions under the Indian copyright Act. In what is considered as one of the landmark Intellectual Property Law judgements in India in, is also a matter of concern for several developing countries where it is impossibly unaffordable for students to buy all prescribed textbooks on account of which they are dependent on these questioned course packs which are compilations of works of prescribed authors that serve as a study material for them. Notwithstanding the fact the judgement of the case, as decided in favor of the defendants

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<sup>1</sup> <https://www.aljazeera.com/indepth/features/2013/03/2013317104829368899.html>

<sup>2</sup> (2016) CS(OS) 2439/2012

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declaring photocopying of copyrighted materials to not amount to infringement of copyright, is a moral victory for students, it unsatisfactorily leaves publishers at a major crisis and calls for a medium to resolve the same. Post the delivery of the judgement it has been discussed in several forums and it has been found out that these cases are a frequently prevalent in not only developing countries like India, Nigeria and South Africa but also in Canada and United Kingdom<sup>3</sup>.

## THE FACTS OF THE CASE

Three publishers, Oxford University Press, Cambridge University Press and Taylor & Francis, in the year 2012, filed a suit against the Delhi University and Rameshwari Photocopy Services before a Single Judge of the IHC in New Delhi (trial court) charging the parties for copyright infringement seeking an interim injunction pending on making photocopies of course packs until the trial of the impending suit<sup>4</sup>. The undisputed facts of the case include the Delhi University identifying course materials based on its prepared syllabi which were basically compilations of excerpts from books published by the petitioners. These extracts were photocopied and compiled into four course packs by the Rameshwari Photocopy Services which operated within the premises of the Delhi University with valid permissions to do the same. These course packs were sold to students at a very nominal rate as compared to the original cost of the textbooks. Also, it was found out that the excerpts constituted only 8.8% of the content of the textbooks from which they were photocopied. Two interim reliefs were granted to the petitioners during the pendency of the case. "In August 2012, initially an ex-parte order was granted to the publishers while a Local Commissioner was appointed in order to conduct search and seizure in the premises of Rameshwari Photocopy Services without prior notice"<sup>5</sup> "It was found out that Rameshwari Photocopy Services photocopied whole textbooks back-to-back"<sup>6</sup>. This was followed by a second relief in terms of an an interim injunction, granted in October 2012, in favor of the petitioners, with a restraining order for Rameshwari Photocopy Services from "making or selling

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<sup>3</sup> supra Note 1

<sup>4</sup> The Chancellor, Masters and Scholars of the University of Oxford v Rameshwari Photocopy Services, (2016) CS(OS) 2439/2012

<sup>5</sup> Order of Honourable Mr. Justice Kailash Gambhir of Aug. 14, 2012 available at [http://delhihighcourt.nic.in/dhcqrydisp\\_o.asp?pn=159532&yr=2012](http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=159532&yr=2012)

<sup>6</sup> DU Photocopy case (Single Judge), para. 3

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course packs and also reproducing the [publishers'] publication or substantial portion thereof by compiling the same either in a book form or in the form of a course pack<sup>7</sup>.”

Eventually the suit was joined by two associations as the 3<sup>rd</sup> and the 4<sup>th</sup> defendants to case. The associations included an association formed by a group of academics, called SPEAK (Society for the Promotion of Educational Access and Knowledge and a group of students had formed an association called ASEAK(Association of Students for Equitable Access to Knowledge)<sup>8</sup> The entire suit was however, dismissed in September 2016, along with the withdrawal of the interim injunction on Delhi University and Rameshwari Photocopy Services. The trial court refused to restrain the defendants from making photocopies of course packs and distributing them to students. It was held that the act did not constitute copyright infringement under the Copyright Act of 1957 rather the actions fell under the exempted defences provided in Section 52(1)(i) of the said Act<sup>9</sup>. The case was then appealed in the Division Bench of the IHC (appellate Court), which was decided in December 2016<sup>10</sup>. The order of the trial court was upheld by the appellate court denying the interim injunction on the defendants. The Appellate Court however remitted the case back for trial of the following issues of fact: (a) if the inclusion of the copyrighted work was an infringement of copyright and (b) if photocopying of the entire book was authorizable. The trial of the above issues did not proceed as the publishers had to withdraw their complaint owing to pressure from students and authors<sup>11</sup>.

## **The Contentions, Judgement and the Court's Interpretation of Section 52 of the Indian Copyright Act,1957**

### ***Contentions of the Plaintiffs:***

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<sup>7</sup> Order of Honourable Mr. Justice Kailash Gambhir of Oct. 17, 2012, available at [http://delhihighcourt.nic.in/dhcqrydisp\\_o.asp?pn=212892&yr=2012](http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=212892&yr=2012)

<sup>8</sup> <https://spicyip.com/2016/09/breaking-news-major-victory-for-students-and-educational-access-in-du-photocopy-case.html>

<sup>9</sup> <http://www.copyright.gov.in/Documents/Copyrightrules1957.pdf>

<sup>10</sup> The Chancellor, Masters and Scholars of the University of Oxford & Ors v Rameshwari Photocopy Services & Ors, (2016) RFA(OS) 81/2016.

<sup>11</sup> Pankhuri Agarwal, Oxford University Students and Others urge OUP to not Appeal to the Supreme Court in the DU Copyright Case (Jan. 24, 2017, 11:38pm), available at <https://spicyip.com/2017/01/oxford-university-students-andothers-urge-oup-to-not-appeal-to-the-supreme-court-in-the-du-copyright-case.html>.

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- The objective of the plaintiffs was to restrain systematic photocopying of their publications in which no additional matter is being added by the University of Delhi.
- The course packs are being sold for a price higher than the prevalent market rate in furtherance of profit motive. The defendants are entering into direct competition with the right holder plaintiffs.
- The defense under Section 52(1)(i) of the Copyright Act, 1957 (“The Act”) is not applicable as the reproduction of work is not by a teacher or pupil and certainly not in the course of instruction. The phrase “in the course of instruction” does not include “in the course of preparation for instruction”.
- The defendants may carry on with the making and selling of course packs after obtaining IRRO (Indian Reprographic Rights Organization) license.
- Reliance was placed on the teaching exception given under Art. 10(2) of the Berne Convention and the three-step test laid in Art. 9 of the Berne Convention and Art. 13 of the TRIPS agreement.

### ***Contentions of the Defendants:***

- The course packs are a compilation of materials from different text books. The ratio of material picked versus entire book is insignificant and does not affect the potential market for the book.
- In a developing country like India, affordability of education is often far-fetched, letting alone purchase of books. It is immoral to expect from Students to purchase various expensive books for only a few relevant portions.
- Section 52(1)(i) of the act does not limit itself to classroom education. ‘Instruction’ must not be confused with ‘lecture’. Referring to the *Longman Group Ltd. v Carrington Technical Institute Board of Governor* (1991) 2 NZLR 574<sup>12</sup>, it was argued that “course of instruction” would include anything in the process of instruction which arises out of

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<sup>12</sup> *Longman Group Ltd. v Carrington Technical Institute Board of Governor* (1991) 2 NZLR 574

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the course of instruction, also encompassing preparation of material to be used in the course of instruction.

- If reproduction is expressly permissible under Section 52, it cannot be restricted by limitations deceiving the purpose of such exemption.
- The question of if there was a need of obtaining IRRO license does not arise if the act of the defendants does not amount to infringement under copyright law.”<sup>13</sup>

## THE JUDGEMENT

The judgement of the case was massively welcomed by the students and the academia community and was appreciated in international jurisdictions as well owing to its public welfare nature, especially in developing countries. The court held that the act of including copyrighted material and compiling them into course packs serving as study material for students were not in contravention of the copyright law in India, rather were within the ambit of the exceptions provided by the said statute.

- The court has beautifully established that copyright is not a natural right and therefore “has to be designed to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to increase and not to impede the harvest of knowledge. It is intended to motivate the creative activity of authors and inventors in order to benefit the public.”<sup>14</sup> It can be understood from this statement that the court indicates that in a situation of social welfare versus personal rights, social welfare shall be given priority over copyright like in this case ensuring easy availability of study materials for students is considered above rights of the publisher. The decision therefore has been both welcomed by students as well as authors and academics with the publishing houses being the only ones at loggerheads.

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<sup>13</sup> Aparajita Nigam, Messiah of Education – The Delhi University Photocopy Case, available at, <https://www.lexorbis.com/messiah-of-education-the-delhi-university-photocopy-case/>

<sup>14</sup> Supra Note 10

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- The judgement clearly lays down that since the act of the defendants does not amount to an infringement under Section 51 of the Indian Copyright Act, 1957, therefore, no prior license is required to be obtained by the defendants for preparation and selling of course packs to be obtained from the IRRO (Indian Reprographic Rights Organization).<sup>15</sup>
- **Interpretation of Section 52(Exceptions):** The court establishes that owing to India's socio-economic conditions, the four- step test factor cannot be adopted to interpret exceptions of Section 52 of the Indian Copyright Act, 1957, according to which whatever a court deems 'fair' upon the four-step test shall be considered a defence. India should interpret exceptions, on the grounds of, ""enumerated exceptions" without any qualification such as "fairness". It is more of an unequivocal exception. The fourth approach is to use a hybrid model. Singapore, for instance, uses a hybrid model encompassing "fair dealing" and "fair use".<sup>16</sup> "The court clarified that unlike the US and other common law countries engaging in a fairly laborious four factor "fair use" test (including the effect of the copying on the market for the copyrighted work)."<sup>17</sup> The relevant paragraphs of the judgment read as follows: "*In the context of teaching and use of copyrighted material, the fairness in the use can be determined on the touchstone of 'extent justified by the purpose'. In other words, the utilization of the copyrighted work would be a fair use to the extent justified for purpose of education. It would have no concern with the extent of the material used, both qualitative, or, quantitative. The reason being, 'to utilize' means to make or render useful. To put it differently, so much of the copyrighted work can be fairly used which is necessary to effectuate the purpose of the use i.e. make the learner understand what is intended to be understood...Thus, we reject the arguments by learned counsel for the appellants that the four factors on which fair use is determined in jurisdictions abroad RFA(OS) No.81/2016 Page 36 of 58 would*

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<sup>15</sup> Dr. Aurl George Scaria, Delhi University Photocopy Shop Judgement: A Landmark In The Access To Knowledge Movement In India, available at, <https://www.livelaw.in/delhi-university-photocopy-shop-judgement-landmark-access-knowledge-movement-india/>

<sup>16</sup>MATHEWS P. GEORGE & CHITHRA P. GEORGE, A Critique Of Delhi High Court Judgment In DU Photocopy Case, available at, <https://www.livelaw.in/critique-delhi-high-court-judgment-du-photocopy-case/>

<sup>17</sup> Shouvik Kumar Guha, DU Copyright Controversy continues: Media joins the Fray, available at, <https://spicyip.com/2013/04/du-copyright-controversy-continues.html>

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*guide fair use of copyrighted material during course of instruction. The qualitative and quantitative test which is one of the four tests would not apply to clause (i)... Further, while the Court in B.D. Bhandari's case, did hold that a fair dealing standard was to be read into all clauses of Section 52 of the Copyright Act, 1957, as held hereinabove, a fair dealing standard has only been provided in clause (a) of sub-Section (1) and not in the other clauses of sub-Section (1) of Section 52, and therefore, cannot be read into the other clauses.” [paragraphs 33, 35 & 72] <sup>18</sup>.*

- **Interpretation of Section 52:** The court considered the Judgement in the “Princeton Univ. Press v. Mich. Document Servs., Inc.<sup>19</sup> where it was held that “defendant’s (photocopy shop) commercial exploitation of the protected works did not constitute fair use. In its analysis, the court weighed the fact that defendant was a “commercial enterprise” copying protected works “on a profit-making basis” against a finding of fair use. The court clarified that while the educational use to which students put the course packs was noncommercial in nature, the challenged use in this case was the defendant’s unauthorized commercial duplication of plaintiffs’ copyrighted works.”<sup>20</sup>
- “The court observed that a general principle of fair use needs to be applied for the apt interpretation of Section 52(1)(i) which states that “The following act shall not constitute an infringement of copyright- [(a) a fair dealing with any work, not being a computer program, for the purposes of— (i) private or personal use, including research”<sup>21</sup> as no express fair use limitation accompanies the provision. Thus, the Division Bench’s judgment clearly established that in order to determine whether the use of a copyrighted work is permitted under Section 52(1)(i), it is only to be seen whether the work used was necessary for achieving the purpose of educational instruction, irrespective of whether

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<sup>18</sup> The Chancellor, Masters and Scholars of the University of Oxford & Ors v Rameshwari Photocopy Services & Ors, (2016) RFA(OS) 81/2016 available at, <http://lobis.nic.in/ddir/dhc/RSE/judgement/16-09-2016/RSE16092016S24392012.pdf>

<sup>19</sup> 99 F.3d 1381 (6th Cir. 1996), available at, Princeton Univ. Press v. Mich. Document Servs., Inc.

<sup>20</sup> Princeton Univ. Press v. Mich. Document Servs., Inc.

<sup>21</sup> <http://www.copyright.gov.in/Documents/Copyrightrules1957.pdf>



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only a certain percentage of the work or the entire work is used.”<sup>22</sup> “Meanings of the terms Reproduction, Teacher, Pupil and In the course of instruction has been established by the court. In order to establish the plural meaning it was laid that the term reproduction, teacher and pupil would mean making more than one copy, teachers and pupils in order to allows distribution of multiple copies. It was also held that medium of instruction would not only constitute of the process of teaching in classroom alone but also the entire process or program of education throughout the semester. “The Court relied on the judgment of the High Court of New Zealand in *Longman Group Ltd. v. Carrington Technical Institute Board of Governors*<sup>23</sup>, wherein the words ‘in the course of instruction’ in Section 21(4) of the New Zealand Copyright Act, 1962 were interpreted to 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. So long as the copying forms part of and arises out of the course of instruction it would normally be in the course of instruction*”.”<sup>24</sup>

- The court also focused on establishing that distribution of course packs would not amount to publication. ““*publication need not be for the benefit of or available to or meant for reading by all the members of the community*” and that “[a] *targeted audience would also be a public*”<sup>25</sup>. Nevertheless, the court rejected the argument that the issuing course packs in this case would be considered as an act of publication on the ground that there elementarily has to be a quotient of Profit earned out of the publication which was evidently missing in this case. “Despite the fact that the court reached to a favorable conclusion, the reasoning behind narrowing down to the same conclusion seems to be incorrect as the court fails to explain how a limited group of students enrolled in a course in a university could be said to amount to ‘public’.”<sup>26</sup> Distribution of course packs to a

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<sup>22</sup> Shamnaad Basheer, Major Victory for Students and Educational Access in DU Photocopy Case available at, <https://spicyip.com/2016/09/breaking-news-major-victory-for-students-and-educational-access-in-du-photocopy-case.html>

<sup>23</sup> [(1991) 2 NZLR 574]

<sup>24</sup> Supra Note 11

<sup>25</sup> Supra Note 10

<sup>26</sup> <http://www.eifl.net/blogs/course-packs-education-ruled-legal-india>

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limited group of students, contrary to the members of the general public, cannot be said to be 'publication'. "This has been laid down judgment in *Caird v. Sime*(1887)<sup>27</sup>, wherein the House of Lords held that students of a university cannot be said to represent the members of the general public and thus delivery of a lecture by a professor to them does not amount to communication to the 'public'." In the same way, in "*Martin Luther King JR. Inc. v. CBS Inc.* (1999)<sup>28</sup>, the US Court of Appeals in the Eleventh Circuit observed that a general publication occurs only if copies of a work are issued to the members of the general public." Therefore, although the court was right in holding that distribution of course packs to students in this case does not amount to publication and thus Section 52(1)(i) would apply, it went erroneous in observing that issuing of copies of a protected work to a targeted audience such as a limited group of university students enrolled in a course could also amount to 'publication'."<sup>29</sup>

- **Reliance of International Covenants:** The argument of the publishers based upon Article 13 of the TRIPS Agreement<sup>30</sup> and Article 9 of the Berne Convention<sup>31</sup> was dismissed by the court noting that "*the contents thereof are merely directory and have enough leeway for the signatory countries to enact the copyright law in their municipal jurisdiction concerning use of copyrighted works for purposes of dissemination of knowledge*"<sup>32</sup>. "While some scholars have alleged that giving broad exceptions may be a violation of the three-step tests provided under the Berne Convention and the TRIPS Agreement, the Court has addressed this issue in a rational manner in the judgment. As per the Court, the Constitution and the international covenants empower the legislature to determine what is justified or reasonable, and the courts cannot impose any limitations on the same. The Court is of the view that the legislators have taken the position that the reproduction of copyrighted works in the course of instruction is justified and it is not prejudicing the

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<sup>27</sup> (1887) 12 App. Cas. 326

<sup>28</sup> 194 F.3d 1211 (11th Cir. 1999))

<sup>29</sup> Supra Note 11

<sup>30</sup> TRIPS Agreement, available at, [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf)

<sup>31</sup> Berne Convention, available at, [https://www.wipo.int/edocs/lexdocs/treaties/en/berne/trt\\_berne\\_001en.pdf](https://www.wipo.int/edocs/lexdocs/treaties/en/berne/trt_berne_001en.pdf)

<sup>32</sup> Supra Note 10

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legitimate interests of the authors. According to the Court, it is inappropriate to restrict or expand upon what has been considered appropriate by the legislators as that would amount to going beyond legislative intent which shouldn't be done unless specific situations. In this regard, it is pertinent to note that many prominent scholars have recommended a liberal interpretation of the three-step test and the Max Planck Declaration is an important document in this regard. The position taken by the Court is in tune with the Max Planck Declaration, which has noted in particular that "[t]he Three-Step Test's restriction of limitations and exceptions to exclusive rights to certain special cases does not prevent (a) legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable; or (b) courts from - applying existing statutory limitations and exceptions to similar factual circumstances mutatis mutandis; or - creating further limitations or exceptions, where possible within the legal systems of which they form a part"<sup>33</sup>.<sup>34</sup>

## CONCLUDING REMARKS

The judgement has been elatedly welcomed by the triumphant students and academicians. Access to Knowledge for student's education has been given more importance over pecuniary benefits of publishers. The judgement has attained the status of a landmark judgement and shall be considered as a valuable precedent for interpretation of copyright exceptions throughout. Some important points through the gamut of the case:

“(a) the need to ensure that copyright law achieves balance between the right of copyright owners to be sufficiently rewarded for their creativity and the public interest in promoting societal wellbeing.

(b) the need for the courts to be aware of this balancing goal of copyright law and to, where appropriate, interpret copyright law to give effect to this goal.

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<sup>33</sup>[https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung\\_aktuell/01\\_balanced/declaration\\_three\\_step\\_test\\_final\\_english1.pdf](https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/01_balanced/declaration_three_step_test_final_english1.pdf)

<sup>34</sup> Supra Note 11

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(c) the potency of copyright law as a tool to achieving equitable access to knowledge for educational advancement.”<sup>35</sup>

(d) The rights of publishers which has been overlooked in order to concentrate on public interest issues. This leads to a situation where an extreme analysis may lead to a thought process where the publishers might suffer commercial blows in terms business procured from academic sales, the market being an important focal point for academic text books and otherwise. However, this can be mitigated by Contractual agreements. Using Contracts where copyright fails, can be a method of adjustment between publications and universities who on could be made to pay certain license fees, strictly to be borne by the university funds and not be inclusive in student fees while students could use course packs. Also, regulating the quantity of copiable content could help.

(e) The judgement has established the independent interpretation of the fair use principle in order to facilitate stricter enforcement of exceptions not only beneficial from the Indian point of view but holistically from the developing country point of view, in alienation from the United States point of view from where essentially the fair dealing principles have been adopted in Indian Copyright Law.

Conclusively, another observation from the intriguing judicial interpretations made by the court can be formulated with the idea that enforcement of Fundamental Rights and prevention of these rights has always been the primary focus of nations recognizing these rights in their supreme law of the land( the constitution in case of India, United States, etc.). Right to dignified life, right to equality are extremely important fundamental rights and education is an extremely instrumental weapon in development and evident practical enforcement of these rights. Copyright on the hand does not qualify as a natural right making it a secondary statue in contrast to the constitution of India whose primary legislative purpose is to ensure public welfare and place public interests above all other law.

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<sup>35</sup>[https://www.researchgate.net/publication/329681749\\_Case\\_Comment\\_Delhi\\_University\\_Photocopy\\_Case\\_from\\_Nigerian\\_and\\_South\\_African\\_Contexts](https://www.researchgate.net/publication/329681749_Case_Comment_Delhi_University_Photocopy_Case_from_Nigerian_and_South_African_Contexts)

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