

Copyright and Coursepacks: A Collision of Competing Values

Rapporteur: Ms Gopika Lekshmi

Introduction

Can university departments authorise the creation of course packs consisting of photocopied excerpts from copyright-protected works? This question was considered by the Delhi High Court, which in Sep. 2016 held that such course packs falls within the ambit of a limitation on copyright, permitting the reproduction of protected works for educational use (specifically, 'by a teacher or pupil in the course of instruction').¹

This decision has far reaching implications and has been appealed. On 24 Nov 2016, a panel discussion was hosted by the Oxford Intellectual Property Research Centre (OIPRC) and the Oxford India Centre for Sustainable Development (OICSD) at Somerville College, Oxford. Dr Dev Gangjee (Oxford Law Faculty & OIPRC) moderated the event and introduced the panelists:

1. William Bowes, Chair of the International Board of the Publishers' Association;
2. Dr Emily Hudson, Senior Lecturer, Dickson Poon School of Law, King's College London;
3. Professor Uma Suthersanen, Chair in International Intellectual Property Law, Queen Mary, University of London; and
4. Professor Lionel Bently, Herchel Smith Professor of Intellectual Property, University of Cambridge.

Since the appeal hearings were imminent, the publishers had been advised that they were unable to comment on the specifics of the dispute and this externally imposed limitation on William was made clear to the audience.

Dr Gangjee began by setting out the basis for the decision as well as the principal grounds of appeal. In particular, Endlaw J. had (i) provided reasons for not adopting a rule of statutory interpretation which interprets provisos or exceptions narrowly, instead treating limitations on an equal footing with infringement provisions; (ii) interpreted 'teachers and students' in s 52(1)(i) to also cover a scaled-up, institutional education setting;² and (iii) interpreted 'in the course of instruction' broadly to cover activities beyond the immediate classroom context. The pending appeal by the publishers:

- Has challenged the basis of the 'equal treatment' interpretative approach;
- Opposes the broad reading of s 52(1)(i) on the basis that it is not supported by the structure of the legislation (it was designed for inter-personal instruction and not applicable at the institutional level);

¹ *The Chancellor, Masters & Scholars of the University of Oxford & Ors. v Rameshwari Photocopy Services & Anr.* (CS(OS) 2439/2012) 16 Sep 2016, Delhi High Court (Endlaw J).

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(i) *the reproduction of any work—*

i. by a teacher or a pupil in the course of instruction; or

ii. as part of the questions to be answered in an examination; or

iii. in answers to such questions;

- The Indian Reprographic Rights Organisation (IRRO) provides a licence-fee based alternative mechanism for providing course-packs in return for remuneration;
- The broad reading of the interpretation conflicts with India's international treaty obligations.

William Bowes

William began by clarifying that he could not address the specifics of the dispute but would present the general case supporting copyright in the context of academic publishing ('Encouraging Learning: How Copyright Enables the Global Provision of Knowledge and Education'). University presses were motivated by the advancement of knowledge, learning and research. As non-profit organizations that had international reach (90% of CUP revenues are from outside the UK and 36% now in developing nations), the income generated by the publishers depends upon the works they publish. This academic ecosystem, where the academics and students of today and provide and share knowledge with those of tomorrow is a key feature that is important to maintain. There were multiple public policy reasons for governments regulating educational content and in order to achieve those objectives, governments nudge behavior to ensure that the optimal exchange of information and ideas occurs. For the last 300 years, copyright has been prominent amongst such mechanisms. In essence, copyright regulates who has what right, why, for how long, who pays and where the costs should lie across the value chain. Copyright enables people to act with certainty by enabling this with publishing skills to curate and organize the world's knowledge and information.

Copyright balances between the private right and public interest through the (i) originality threshold, (ii) limited copyright term and (iii) exceptions, including fair dealing and fair use. Publishers understand that exceptions (many of which relate to educational use) are part of the quid pro quo and should be respected. However there must be clarity about the boundaries of these exceptions. Academic publishers value (a) the freedom to publish, (b) academic freedom, (c) editorial freedom, (d) access to education, (e) commitment to excellence, (f) developing skill in ordering information, (g) fair access and fair remuneration, (h) the stability provided by a reliable, reciprocal international framework. The above freedoms can only be secured if supported by an adequate funding model – which copyright presently provides – rather than through public or other funding, as that would carry risks of some or all of a reduction in quality, risk to publishing plurality and a broad literary cannon and/or political interference in editorial decisions. Fair access is not equivalent to free access and the copyright system had been successful because there was a broad international agreement on the expectations under the law. This would be adversely affected if individual countries started broadening the educational use exceptions.

Dr. Emily Hudson

Emily's analysis focused on the interpretation of s. 52(1)(i) of the Indian Copyright Act, 1957. In her opinion, it was arguable that Justice Endlaw's interpretation has produced the broadest educational use privilege in the world, certainly extending beyond understandings of fair dealing and fair use in Canada and the US. Emily described her unease with the Delhi judgment because of the lack of a clear articulation of the boundaries of s. 52(1)(i), giving the

impression that the provision is unlimited. Emily identified two reasons for this: the absence of any explicit fairness language in s. 52(1)(i) itself; and the broad reading given by Endlaw J to each component of the provision. This is unlike the comparable British exception (CDPA s. 32), where fair dealing does the intellectual heavy lifting.

The process by which an expansive interpretation was reached raised (a) rule of law as well as (b) normative issues. On (a), it has been said that the Delhi decision does not support wholesale copying of books because it pertained only to extracts, and there is some logic to this argument. However, the decision does not limit itself to the particular facts before it, unlike the more fact-intensive reasoning in the Canadian *CCH* and *Alberta v Access Copyright* rulings. If one wanted to limit the operation of s. 52(1)(i), there are a number of approaches one could adopt, such as: (a) restricting the limitation to 'pushes the button' situations (i.e. individual acts of photocopying or other forms of reproduction directly by teachers or students, which would exclude institutional facilitation); (b) applying inbuilt reasonableness ideas when reading the limitation; or (c) interpret s. 52(1)(i) narrowly, but apply s. 52(1)(a) (fair dealing) to these fact patterns, using Canadian-style reasoning.

On (b), the central debate is whether s. 52(1)(i) should be given a narrow or broad interpretation. We are presently in a 'Goldilocks' situation – the literal wording of the provision might be too narrow but Endlaw J's interpretation is very broad. How do we arrive at an approach that is 'just right'? This will depend on normative views regarding the reasonable market for academic publishing and the privileges that should be given to educational institutions, including those in jurisdictions with more acute access to knowledge concerns. The difficulty was that Endlaw J provided a largely one-sided decision that discussed (accurately) the difficulties facing students and educators, but without properly addressing the interests of other stakeholders.

The presentation concluded with a challenge to the publishing industry. Even if the publishers secure a victory in the appeal, it will not be a comprehensive solution to the problems they face. It is only to a certain extent that business models can be preserved and market relevance retained through an IP enforcement strategy. Publishers and reprographic collectives are already under pressure from legitimate market players. Two in particular are publishing via open access models and the emergence of commercial databases which offer access to increasingly overlapping content. Unless the value proposition changes for the users, the litigation strategy adopted by the publishers will have only limited success.

[Professor Uma Suthersanen](#)

Uma began by also confessing to some ambivalence about the decision. Her presentation was informed by a rights-based approach. A teleological approach to legal interpretation – guided by the purposes, values and goals of the underlying provisions – was entirely legitimate in some situations. This was especially valid when interpreting rights (such as copyright) that were informed by human rights norms. While authors' rights were protected under international human rights conventions, exceptions to these rights were simultaneously recognized under the same instruments. Authors' rights being limited or diluted in the public interest was not a novel concept, historically being endorsed by even staunch supporters of authors' rights such as Victor Hugo.

One critique of Endlaw J's decision is that he views exceptions and limitations as user rights. However, such an interpretation is less troubling when it is understood that second generation human rights – which include those recognizing IP – are generally interpreted as collective and not as individual rights. Therefore, user rights can be expressed in terms of the collective interest. It is reasonable that reproduction (via course packs) should be institutionalized and not be limited to individual reproduction within the classroom. Moreover, the Delhi decision is not as radical as the Canadian SC decision in *Access Copyright* which interpreted 'private study' to allow photocopying by students. Given Endlaw J's teleological approach, the Delhi HC decision can be read as a social welfare orientated judgment, as is evident from its text. Moreover, the right to education provisions under Art 13 of the International Covenant on Economic, Social and Cultural Rights, 1966 is not restricted to primary education and could extend to university education. Hence, Justice Endlaw's approach was to construe exceptions as user rights; an approach that is already visible in the jurisprudence of free speech. This interpretation is a reflection of evolution of human rights law and the recognition that IP norms must interact with other constitutionally-grounded normative orders.

Professor Lionel Bently

Lionel's presentation focused primarily on the extent to which international treaty obligations could influence the outcome. However the presentation began by drawing a distinction between two categories of grounds of appeal put forward by the publishers. While some – such as the addition of a fair dealing filter – would reasonably limit the breadth of Endlaw J's interpretation, others – such as the requirement that reproduction be limited to an individual teacher or pupil – would completely deprive Delhi University of the ability to provide course-packs without paying a licence fee. The publishers' appeal also argues that Endlaw J's decision violates the 'three step test' under the Berne Convention and TRIPS.³ Two counterarguments were raised in response: *first*, that the three step is not relevant in this context and *second*, even if it was relevant, Endlaw J's decision does not violate it.

As to the first argument, the relevant provision is Art 10(2) of the Berne Convention and not Art 9(2). The term used under Art 10(2) is 'utilisation' and therefore, the provision is not limited to reproduction. Moreover, the provision provides for such utilization in publications and broadcasts for teaching, so is clearly not limited to classroom use. The issue then is whether creating a course pack constitutes use by way of 'illustration' for teaching and the history of Art 10(2) indicates that it squarely covers compilations. It may be objected that Art 10(2) requires the use to accord with 'fair practice,' and that s 52(1)(i) thus does not comply because it contains no fair dealing restriction. However, it seems there need not be an explicit fairness limitation if the established practices under the law are such that the use is fair. This is relevant because we are discussing syllabi set by teachers for students (i.e. the purpose is clearly educational instruction) and practicality as well as social norms should inform legal interpretation. Thus Endlaw J's interpretation seems to be permitted by Art 10(2). The

³ The test requires that unauthorised reproduction is permitted only (i) in certain special cases, (ii) provided that such reproduction does not conflict with a normal exploitation of the work, and (iii) does not unreasonably prejudice the legitimate interests of the author or, under TRIPS, the rightholder.

question of whether Art 13 of TRIPS (which adopts 'three steps' requirements) is the 'single sieve' that also limits Art. 10(2) of the Berne Convention was also considered. Here the better view was that Art 10(2) of Berne survives unaffected by Art 13 of TRIPS, as Art 9 of TRIPS incorporates Articles 1-21 of the Berne Convention apparently intact. Art 13 of TRIPS cannot add a gloss to Art 10(2) of Berne.

On the second argument, assuming the three step test is applicable, it has not been violated. The Records of the 1967 Stockholm Revision on the three-step test specifically mention photocopying. These Records state that if there has been cover-to-cover copying and a reasonable number of copies have been made, then equitable remuneration has to be paid. . However, if only a small number of copies are made, then photocopying is permissible without payment. While the WTO Panel decision in DS 160 R adopted a rather narrow and mechanical interpretation of the three steps, Lionel argued that there were good reasons to adopt the so-called 'balanced interpretation' of the three-step test under TRIPS, particularly so as to give flexibility in creating public interest exceptions, such as those for educational use.

Turning to the compatibility of s 52(1)(i) with the three steps, under the first step public policy considerations should be relevant when deciding what falls under 'certain special cases'. Even if this is not the case (as WTO DS 160R indicated), clause (i) is sufficiently narrow as a special case since a teacher is required to prescribe the syllabus. As regards the second step, there was no conflict with normal exploitation. Endlaw J's decision does not deal with a situation where the photocopying of whole books acted as a substitute to normal market of sale of books. Normal exploitation can be understood to have a dynamic element including the future exploitation of works. However the loss of IRRO licensing fees cannot be seen as depriving the publishers of a significant commercial. Moreover, s 52(1)(i) does not fail the third step for similar reasons, and as the exception does not unnecessarily extend beyond its goal. In conclusion, multilateral copyright exceptions were consciously designed to reflect cultural and economic priorities which varied at the national level. The Indian educational sector was very different from that of the UK or North America. Such differences should be capable of being accommodated by the flexibility deliberately left open in the international copyright system.

Concluding discussion

The ensuing (and lively) discussion commenced with an affirmation that publishers' business models were adapting – the largest open access publisher was also the larger traditional publisher- but the importance of a sustainable cost model in the publishing industry should not be underestimated. Publishers were also committed to access by charitable donations of books and granting gratis access to electronic resources in certain cases. However somebody would ultimately have to pay for content. The subsequent questions ranged from asking how fairness operates in relation to access and education issues in developing countries to those analyzing the economic model relating to these issues, including the evolution of new business models for delivering academic content and the question of whether authors' and publishers interests were aligned for this dispute.