

# Copyright and Course Packs: A Collision of Competing Values?

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## North American provisions

- Canadian Copyright Act, s. 29: Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.
- US Copyright Act, § 107: ... the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. [*The Act then sets out four fairness factors.*]

## Indian Copyright Act, s. 52(1) (extracts)

- The following acts shall not constitute an infringement of copyright, namely:
  - (a) a fair dealing with any work, not being a computer programme, for the purposes of—
    - (i) private or personal use, including research; ...
    - (ii) criticism or review, whether of that work or of any other work;
    - (iii) the reporting of current events and current affairs ....
  - ...
  - (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.

- [55] ... Education in the country though at one time pursued in *Guru-Shishya parampara* (Teacher – disciple tradition) has for long now been institutionalised, both at school and post-school level, with imparting of education by a teacher individually having no recognition. ... Thus, merely because imparting of education by teachers today is as part of an institution ... and it is the [institution] which on behalf of its teachers is reproducing any copyrighted work by making photocopies thereof, would not mean that s. 52(1)(i) would not be applicable. ...

- [72] ... the words “in the course of instruction” ... would include reproduction of any work while the process of imparting instruction by the teacher and receiving instruction by the pupil continues i.e. during the entire academic session for which the pupil is under the tutelage of the teacher ... imparting and receiving of instruction is not limited to personal interface between teacher and pupil but is a process commencing from the teacher readying herself/himself for imparting instruction, setting syllabus, prescribing text books, readings and ensuring, whether by interface in classroom/tutorials or otherwise by holding tests from time to time or clarifying doubts of students, that the pupil stands instructed in what he/she has approached the teacher to learn. ...

## Bently & Sherman (4<sup>th</sup> ed) pp. 253-4

- “Instruction” in CDPA s. 32(1) is not limited to the passive receipt of information by the student, such that the exception applies only to, eg, material in handouts and slides. A broader approach is to be preferred.
- Reasoning:
  - Statutory cues, eg, exception relates to acts by those giving *and receiving* instruction.
  - Source of language from InfoSoc and, in turn, Berne Art. 10(2).
  - Art. 10(2) supports a broad interpretation, eg, it has been said to capture “any reasonable use for the purpose of education or teaching” (quoting Xalabarder 2009).

## CDPA, s. 32(1)

- Fair dealing with a work for the sole purpose of illustration for instruction does not infringe copyright in the work provided that the dealing is
  - (a) for a non-commercial purpose,
  - (b) by a person giving or receiving instruction (or preparing for giving or receiving instruction); and
  - (c) accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).

## Observations

- Rule of law issues, eg:
  - Can the statutory language bear the interpretations given?
  - The predictive value of this case for other cases.
    - Compare *CCH v Law Society of Upper Canada*, 2004 SCC 13; *Alberta (Education) v Canadian Copyright Licensing Agency*, 2012 SCC 37.
  - Ways to find some limits (and clarity?) in s. 52(1)(i)?
    - “Pushes the button” limitation.
    - Inbuilt reasonableness.
    - Look elsewhere, notably s. 52(1)(a).

## Observations

- Normative issues, eg:
  - Much focus on the reasons supporting unremunerated copying.
    - More nuance required in the treatment of *Williams & Wilkins v US* 487 F 2d 1345 (Court of Claims, 1973).
    - Other US cases not discussed, eg, *Basic Books v Kinko's*, 758 F Supp 1522 (SDNY, 1991); *Princeton University Press v Michigan Document Services*, 99 F 3d 1381 (6th circ, 1996); *Georgia State* litigation.
  - What do we want educational publishing to look like in the future? What is the scope of the reasonable market?