

The University of Delhi Photocopying Case – International Dimensions

Lionel Bently
(University of Cambridge)

Section 52(1)(i) as interpreted

52. (1) The following acts shall not constitute an infringement of copyright, namely:

....

(i) the reproduction **and distribution of copies** of of any work **by or on behalf of** a teacher or a pupil **for the purpose of use** in the course of instruction; or

OUP, CUP and T&F's appeal

- Should be viewed as exception (D)
- Should be construed narrowly (E)
- Should be limited to 'teacher', 'pupil' (F)
- Should be limited to natural persons (G)
- Should be limited to classroom (I)
- Should be limited to fair uses (J)
- Should be limited to reproduction not 'publication' (H, M)

Appeal invokes international law

- "B. That the interpretation of the Learned Single Judge runs contrary to India's International obligations, in particular the 'Three Step Test.'"
- E. 3 step test requires narrow construction. The Judge's "broad interpretation....fails the 'Three Step Test'"

What is meant by the “three step test”?

Art 9(2) BC It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works

(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.

TRIPs Art 13

“Members shall confine limitations and exceptions to exclusive rights to

(i) certain special cases

(ii) which do not conflict with a normal exploitation of the work and

(iii) do not unreasonably prejudice the legitimate interests of the right holder.”

Two Issues

(a) Is the “3 step test” relevant?

Is Art 52(1)(i), as interpreted, within Art 10(2) BC? If so, is it limited by Art 13 TRIPs (‘three step test’)?

(b) If the 3 step test is relevant (either because of Art 9(2) BC or Art 13 TRIPs), would it fail the test?

Berne, Article 10(2)

- (i) It shall be a matter for legislation in the countries of the Union, ... to permit
- (ii) the utilization, of literary or artistic works
- (iii) by way of illustration
- (iv) in publications, broadcasts or sound or visual recordings for teaching
- (v) to the extent justified by the purpose
- (vi) provided such utilization is compatible with fair practice.

Illustration...in publications... for teaching

- Not limited to reproduction.
- Not limited to classroom use
- Limitations:
 - (a) need for “illustration” for teaching
 - (b) fair practice

“Illustration”: Two Views

S. Ricketson, *The Berne Convention* (London: Sweet & Maxwell, 1986), [9.27] n 7:

“In many instances [teaching compilations] will by their very nature, fall within the scope of publications made for teaching purposes under article 10(2).”

Cf. Ricketson & Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, (Oxford: OUP, 2006), 794, [13.45]:

‘it will be a distortion of language to describe ...a ‘course pack’ ..., as being used ‘by way of illustration...for teaching.’

The History

- Berne, 1886, Article 8: “the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies.”
- Brussels, 1948: “the right to include excerpts from literary or artistic works in educational or scientific publications”.
- Stockholm, 1967: Current form. Illustration - “to be understood in the sense of subsidiary reproduction.” Subsidiary to teaching?

‘Fair practice’

- Amount copied will be relevant: see *Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, SCCR/9/7* (2003, 9th Session of SCCR, 15, [8])
- Need there be an explicit fairness limitation? Not if construction is such that exception would only apply where fair (provided only to students, nexus with instruction via syllabus, etc).
- Importance of social norms in limiting practical application.
- Is there incompatibility because it *could* justify copying the whole?

TRIPs Art 13 (three-step test)

- Some suggest this is the “single sieve” by which exceptions are judged?
- WTO Panel Decision in DS 160 R (15 June 2000)
- But, [6.82], did not rule on the relationship between Article 13 and the express exceptions provided for in Berne, such as Article 10(2). Rather a limit on “non-exhaustive” category of “minor exceptions”
- TRIPs incorporates Art 1-21. Better view: no effect.

Berne, Article 9(2)

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works

in certain special cases,

provided that such reproduction does not conflict with a normal exploitation of the work

and does not unreasonably prejudice the legitimate interests of the author.

Stockholm, Records, at 1145-6

“A practical example may be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.”

WTO Interpretation of 3 step test in Art 13 TRIPs

- WTO Panel Decision in DS 160 R (15 June 2000)
- Peculiar facts (bar and grills – ‘pork barrel’)
- Not a definitive interpretation of TRIPs or subsequent practice: Senftleben, pp. 108-9.
- Subsequently: WCT many more signatories. Preamble: ‘Recognising the need to maintain a balance between the rights of authors and the large public interest, particularly education, research and access to information, as reflected in the Berne Convention’
Munich Declaration on ‘balanced interpretation.’

Is s 52(1)(i), as interpreted, within the first step?

- **‘Certain special cases’**: ‘clearly defined’... ‘limited in its field of application’ and ‘narrow in scope and reach’ (not necessarily legitimate purpose)
- Cf. Senftleben who prefers qualitative view – is the exception justified by a public policy (with due deference)? (146)
- Even if WTO correct: is this not narrow in scope and reach?

Would s 52(1)(i), as interpreted, ‘conflict with normal exploitation’?

- If primary market is sale of book to students and whole books are being copied as substitutes: yes
- But WTO Panel states ‘normal’ has empirical and normative side- the latter having a ‘dynamic element’ (para 6.178), covering future forms of exploitation (para 6.180).
- Use conflicts if deprives of significant or tangible commercial gains (para 6.183)
- Could include IRRO licensing scheme and fees. Yes, but significant...?
- Ricketson & Ginsburg, para 13.21-22 proposing that normative considerations have a bearing on ‘normal’ exploitation: competing considerations eg right to education

Does interpretation of s 51(1)9i) 'unfairly prejudice the legitimate interests of the rightholder.'

'Interest' not necessarily only economic (para 6.223).
'Legitimate' means 'legal or justifiable'. Prejudice is equated to 'damage'. 'Unreasonable' suggests disproportionate.

- 'prejudice...reaches an unreasonable level if an exception...causes or has the potential to cause an unreasonable loss of income to the copyright holder.' (6.229)
- Not just present income: para. 6.248.
- 'unreasonable' – disproportionate to goal being achieved? Does the exception extend unnecessarily beyond goal?

Conclusion: Pluralism with Exceptions

- Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, 'Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together,' (1997) 37 Va. J. Int'l L 275, 306:

"The extent to which fair use is considered necessary depends on fundamental national values such as the importance and extent of free speech, on artistic traditions, and on aesthetic sensibilities. Setting a worldwide standard on this issue would, therefore, reduce flexibility and produce a kind of cultural homogenization that might either induce noncompliance or turn the world into a much less stimulating environment.")