

Photocopying for educational purposes law international essay

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After analysing the provisions in the statute and the judicial interpretation of the same regarding doctrine of fair use/fair dealing in educational context, it will be easy to answer the question whether photocopying for educational purposes constitute fair use or not? Undoubtedly, there can be no direct answer to this question and it will largely depend on the facts and circumstances of the case. Under this chapter, an attempt will be made to answer this question by analysing the cases where the courts in different jurisdictions were confronted with the issue (more specifically, the courts in the U. S. A. have decided various cases on this point) and by considering various situations like, the issue of course packs, multiple copies by teachers for distribution in class, photocopying for research (commercial and non-commercial purpose), photocopying for private or personal use and photocopying of out-of-print book etc. Guidelines and Leading Case Laws: Before, discussing the judicial decisions in this regard as decided by the U. S. A courts, it is essential to discuss various guidelines which formed the core of the disputes in various cases in the U. S. A. The early fair use guidelines did not embody workable standards, but act as a basis for the development of further guidelines. The earliest example of such a fair-use guideline was ' the Gentlemen's Agreement, 1935' which has been recognised as one of the most important landmark in the history of the fair use privilege and was a product of long deliberations that started back in the year 1929.[1]Kenneth Crews, calls this agreement as ' one of the first attempts to interpret fair use for education' and noted that it ' remained the only major copying standard for almost a quarter of a century.'[2]The agreement allowed library, archives, museum or similar institutions to make single photographic copies

of a part of a copyrighted work; however these copies were not supposed to substitute the purchase of the original work and were meant only to facilitate research. This agreement was a model of consensual voluntary guidelines agreed to by copyright owners and users to identify the limits of fair use and was cited by both the trial and appellate courts in *Williams & Wilkins Co. v. United States*.^[3]In this case, the publisher of various medical journals, brought suit against the National Library of Medicine (NLM) for making and distributing photocopies of its journal articles in the name of interlibrary loans. The commissioner held that the copying was beyond the scope of fair use; however on appeal, the decision was reversed. In a review sought by the publisher before the U. S Supreme Court, the decision of the appellate panel was upheld that the copying in question was fair.^[4]This particular case is of considerable importance and had effect on the revision of the copyright law in the year 1976. In conjunction with the passage of the revised copyright law in the year 1976, the best known of all the fair use guidelines emerged known as ' Classroom Guidelines'. The 1976 revision of the copyright law incorporated fair use doctrine in the statute and allowed copies for teaching but within the limits of the four factors as set out above. However, still there was uncertainty in law and the new law was open to broad interpretation. Consequently, representatives of educators, authors and publishers met during the years prior to passage of the 1976 Act in order to negotiate an understanding of the new law and the product of these meetings was the ' Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions'. These guidelines allowed: Single copies of short items, such as an article or a chapter of a book to be made by a

teacher for research or class preparation. Multiple copies for distribution (single copy per student) subject to the limits of brevity,[5]spontaneity[6]and cumulative effect[7]and copies must include a notice of copyright. There were certain other limitations to this like students cannot be charged more than the actual cost; copying shall not be used to create anthologies, compilations or collective works and the copying cannot substitute for a purchase of books etc. Apart from the Classroom Guidelines, other guidelines also emerged like Music Guidelines, 1976;[8]and the Off-Air Videotaping Guidelines, 1981.[9]All these guidelines are referred to as early fair use guidelines for educational purposes. In addition to these early guidelines, a need was felt by the Congress to address new technologies more specifically the looming demands of computers and large-scale photocopying. As a result, the National Commission on New Technologies Uses of Copyrighted Works (CONTU) was established in the year 1979 to make recommendations for implementing the new law. The recommendations so made majorly dealt with section 108 which allowed libraries to make copies of some works to meet the research and study needs of individual users. Therefore, under the guidelines, libraries are allowed to receive from another library, up to five copies of articles from the most recent years of issues of a single journal during a calendar year. These guidelines developed further during the year 1994-1998 in the Conference on Fair Use and with some independent meetings between the stakeholders which resulted in guidelines dealing with multimedia works, distance learning and digital images.[10]After a brief introspection of the fair use guidelines, it is essential to discuss various judicial decisions on this point. The first infringement action against

photocopying for educational uses arose in *Association of American Publishers v. New York University*.^[11] In this case, publishers brought copyright actions against two shops that were indulged in photocopying copyrighted materials for student use. The parties arrived at out of court settlement and the settlement included an agreement that the shops would adhere to the Classroom Guidelines as a limit on fair use. The dispute again arose in *Basic Books Inc. v. Grpahics Corporation*,^[12] which had the 'course-packs' at issue. The publishers alleged that Kinko's had infringed copyright in their books by making multiple copies of lengthy excerpts and compiling them into 'course-packs' and selling the same to the students. Further, it was alleged that Kinko operated a programme to solicit from professors the business of making and selling copies. The court after analysing the four factors under section 107 concluded that the copying was not fair use. However, the court made it clear that the statute and not the guidelines, is the source of the law, further guidelines would apply to copying by an instructor or an educational institution and not by a for-profit copy shop. In *Princeton University Press v. Michigan Document Services Inc.*,^[13] again the struggle between the meaning of fair use in general and the applicability of the Classroom Guidelines was at issue under the circumstances similar to the Kinko's case. The court evaluated the facts of the case in the light of the four factors and concluded that the use was not fair and also pointed out that the guidelines state the minimum and not the maximum standards of educational fair use and the guidelines are not the law. However, it did not address the issue whether course-pack production may be fair use if conducted by a university or non-profit copy shop. Similarly in, *American*

Geophysical Union v. Texaco Inc.,[14]the court held that the photocopying of eight articles from the Journal of Catalysis for use (articles would facilitate current or future professional research) by one of Texaco's researchers was not fair use. Though the court noted that photocopying was for researchers own need but concluded that the ultimate purpose was to strengthen Texaco's corporate profits. The court further clarified that its decision applied to systematic institutional copying and not to isolated copying by the independent researchers. However, in his dissenting judgment, Jacobs J., observed that the selection by an individual scientist of the articles useful to that scientist's own inquiries is not systematic copying, and does not become systematic because some number of other scientists in the same institution are doing the same thing. In Marcus v. Rowley,[15]the plaintiff wrote a thirty-five page booklet on cake decorating and used it to teach adult-education classes and sold the same to her students with the inclusion of a proper copyright notice for two dollars. The defendant purchased a copy of the booklet and later developed her own booklet. The booklet so developed by the defendant contained eleven pages of the twenty four pages directly from plaintiff's work and the same was not acknowledged. The court ruled that the use was not fair use and applied the test of brevity, spontaneity and cumulative effect as contained in the guidelines to reach the conclusion that it amounts to copyright infringement. Similarly, in Bridge Publications Inc. v. Vien,[16]the defendant was accused of reproducing or instructing students to reproduce literary works and sound recordings for use in a for-profit course taught by the defendant. The court relied on guidelines and held that the defendant's use did not fit within the special guidelines as the

defendant's copying was not limited and spontaneous, but was extensive and methodical and consisted of copying from the same author, time after time. A recent case, Cambridge University Press v. Mark P. Becker,[17] goes beyond photocopying of copyrighted works and deals with uploading of excerpts from various books on a website by a university (though website can be accessed only by students). The complaint was filed by the plaintiffs, various publishers alleging that the defendants, officials of Georgia State University had infringed copyrights by allowing unlicensed portions of plaintiff's copyrighted books to be posted electronically and made available electronically to students. The court dealt in detail with every alleged copyright infringed work and majorly holds in favour of the defendants. Of the ninety nine alleged infringements, only seventy five were submitted at the start of the trial. While holding for the defendants the court observed that only the unlicensed use of five excerpts infringed plaintiff's copyright and except these all the alleged use was by a non profit educational institution for the non profit educational purposes of teaching and scholarship; free copies were provided for the exclusive use of students and the portion so uploaded adhered to the limits so prescribed. The publishers have filed an appeal against this decision which is pending for now.

[18]Analysing various situations on the anvil of the Indian Copyright Act, 1957: The analysis of various situations are necessary in reference to the provisions of the fair dealing under the Indian Copyright Act, 1957 before arriving at any conclusion on the problem of doctrine of fair use vis-à-vis photocopying for educational purposes. Such situations are: A researcher/student intends to use a photocopy of an article for her private

use: This particular aspect is very well covered by section 52(1)(a)(i) of the Indian Copyright Act, 1957 i. e. fair dealing of a copyrighted work for private use or research and needs no further discussion. A student intends to get a photocopy of a book for his own use because the book is expensive: The cost of the book cannot be a consideration under the provisions of the act. Some may argue that photocopy of a complete book may be justified under section 52(1)(a)(i) of the act because it is a fair dealing for private use. Other may argue that photocopy of a complete book cannot ever be a fair dealing because of its potential effect on the market. This particular aspect will need due consideration of all other aspects before arriving at any conclusion.

Photocopy of a book out of print for private use: This may very well be considered as an example of private use. Though photocopying the entire book would normally exceed the bounds of fair use/dealing but since the book is out of print and no longer available, the copying is acceptable. A teacher intends to distribute photocopy of an article in a class i. e. multiple copying: This situation is very well covered under the statutory fair use provisions in the U. S. A., however, in India it is still doubtful whether such multiple copying can be covered under any educational exception. Issue of course packs i. e. a teacher copies excerpts of documents, including copyrighted text books and journals from various sources and plans to distribute the materials to his class as a course pack: This situation will require a complete fair use/dealing analysis and consideration will be given to the amount and substantiality of the portion included, its effect on the market etc. In the U. S. A. since multiple copying for classroom use is allowed so inclusion of the excerpts in a course pack will not change a fair

use to an infringing use. However, one more consideration crops up i. e. when the photocopy shops sells such course-pack then it is essential to look into an important facet, at what price the shop is selling the course pack, whether there is a profit inclination in it or it is merely recouping its cost. Therefore, it cannot be simply concluded that photocopying for educational purposes amounts to fair use and it largely depends on the facts and circumstances of every case. Every case is to be judged on various aspects like amount of the portion taken, its effect on the market, commercial or non-commercial use etc.

IV. INTERNATIONAL AND NATIONAL EFFORTS TO DEAL WITH THE PROBLEM OF PHOTOCOPYING

Undoubtedly, the problem posed by the advancement of technology in the area of reproduction of copyrighted works by way of photocopying is not curtailed to the national boundaries and is a global concern. Hence, this issue has been addressed at both international and national levels.

International Efforts:

The issue of the reproduction of copyright works by way of photocopying has been under study at the international level since 1961. An attempt was made by two competent bodies of WIPO[19]and UNESCO[20]to give answers to certain emerging technologies after the last revision of the Berne Convention, 1886 in the year 1971 at Paris. The first attempt was made in June 1975, when a working group was set up jointly by the Inter Government Copyright Committee of the Universal Copyright Convention, which was administered by UNESCO, and by the Executive Committee of the Berne Convention, which was administered by WIPO.[21]The working group

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concluded by recommending national solutions rather than the uniform international solution.[22]It was recommended that:[23]Each of the states should establish whatever is best adapted to their education, cultural, social and economic development in order to assure the protection of the economic interests of copyright owners under the convention, andStates where reprography is widespread should consider among other measures, encouraging the establishment of collective systems to exercise and administer the right of remuneration. Subsequently, the WIPO-UNESCO Group of Experts on Unauthorized Private Copying of Recordings, Broadcasts and Printed Matter, in Geneva, in June 1984, also found that in cases in which it was not justified to maintain the exclusive right of reproduction, the desirable solution can function only through a collective management system.[24]One more thing to be appreciated and emphasised is that there was a specific mention of the special and different needs of the developing countries in context of the reproduction of the copyrighted materials. [25]Further, in accordance with the programme of WIPO, a committee of experts was convened from November 4-8, 1991 to examine questions concerning a possible protocol to the Berne Convention and the second session of the committee was held at Geneva from February 10-17, 1992. The report which was finally adopted did not contain any detailed provision on reprographic reproduction as article 9(2) of the Berne Convention[26]was an appropriate basis for national laws to regulate possible exceptions in respect of reprographic reproduction.[27]The later sessions of the committee meetings, did not deliberate on the aspect of reprographic reproduction. [28]Therefore, at the international level, the matter of the reprographic

reproduction has been left completely to the domestic legislations; however, there has always been a mention of the collective management system which has been adopted by many countries in resolving this issue. Even, at the international level, organization for the collective management system was formed in the year 1980 named as International Federation of Reproduction Rights Organizations (IFRRO), which began as a working group of the Copyright Committee of the International Publishers Association and the International Group of Scientific, Technical and Medical. It was in the year 1984 that the working group became an informal consortium called the International Forum for Reproduction Rights Organizations and in the year 1988, it became a formal federation eligible to represent its constituencies before international bodies.[29]Almost all the national reprographic reproduction organizations are members of IFRRO.[30]The basic aim of the IFRRO is to increase on an international basis the lawful use of text and image based copyright works and to eliminate unauthorized copying by promoting efficient Collective Management of rights through RRO's to complement creators and publishers own activities.[31]

National Efforts:

At the national level, the collective administration of rights is considered to be the best possible solution and for this in almost all countries, Reprographic Reproduction Organization was formed so as to license the reprography right. A number of different licensing systems exist throughout the world which includes non-voluntary licensing[32]and voluntary licensing. [33]Further, there is existence of equipment levy system in some countries. [34]United States of America: In the United States of America, the problem is

resolved to some extent by way of various judicial pronouncements and guidelines as discussed above. In addition to this, there exists collective administration society known as the Copyright Clearance Center (CCC). The Copyright Clearance Center was founded in the year 1978 as a not-for-profit organization and which simplified the access and licensing of content to the academic institutions so as to share copyrighted material by compensating publishers and creators for such use. The collective administration system as adopted by the CCC is completely based on non-exclusive contracts wherein the authors and publishers decide which works are to be included in different licensing programmes. The licenses so provided are basically of two types, firstly, 'blanket licenses' which permits the user to make unlimited numbers of copies of parts of all works mentioned in the license for payment of a single annual fee decided on the basis of statistical surveys. Example of such a license is Annual Copyright License for Academic Institution which is a single, multi-use copyright license for academic institution and wherein the faculty, researchers and other members of a college or a university can collaborate freely to use copyrighted works in course packs and classroom handouts, internal e-mail and photocopying.[35] Secondly, 'transactional license' wherein copy-by-copy tracking of all copies takes place and each the owner/author sets the fees for copying. Therefore, a copyright holder can, set different fees for different works and for different uses. Example of such a license is Pay-Per-Use Services which provides copyright permissions when one need them and wherein an academic institution is allowed to photocopy material from books, newspaper, journals and other publications for use in course packs and classroom handouts.[36] There are several other

organizations as well like the American Society of Composers, Authors and Publishers (ASCAP) which permit the use of music by way of a license and the Recording Industry Association of America (RIAA) that have information about authorization to use works. In *American Geophysical Union v. Texaco Inc.*,^[37] the court endorsed the importance of the Copyright Clearance Center and observed that though the publishers may not have established a conventional market for the direct sale and distribution of individual articles, they have created, primarily through the CCC, a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying. Jacobs J., in his dissenting judgment disagreed that the development of licensing mechanisms such as the CCC should tip the balance against fair use. Therefore, it has to be admitted that even courts were not fully convinced regarding the importance of the CCC and its role in balancing the interest of the publishers on one side and students or researchers community on the other. United Kingdom: In U. K, the problem of reprography has been under consideration for long and publishers have contemplated possible solutions without arriving at any clear policy.^[38] The Whitford Committee,^[39] for the first time in the year 1977, discussed this issue extensively and proposed the introduction of appropriate blanket licensing arrangements through collecting societies of right owners. Further, it was proposed that the Government will be given the power to supervise the establishment and organisation of these societies and where proper licensing arrangements will be in place, the fair dealing exception for research and private study would no longer be available. Therefore, license will be required for single as well as multiple copying of copyright materials;

however, this idea was strongly resisted by the educational organisations and was considered politically unacceptable. During the 1980's again an attempt was made by the publishers to press for the licensing arrangements and after substantial debate in 1988, the Government agreed that steps have to be taken to introduce a levy system that would provide fair compensation to the owners of the copyrighted works and that can be implemented only from collecting society enforcement relating to multiple copying. In between this, the Copyright Licensing Agency (CLA)[40] came up in the year 1983 and which is a joint venture between British authors[41] and British publishers[42] and dealt with collective licensing reprography rights. [43] The CLA is a member of the International Federation of Reproduction Rights Organisation (IFRRO) and has bilateral agreements with thirty-one countries to ensure that when British published works are copied. The CLA specifically provides Licenses for Education which includes Schools Licenses for state and independent primary and secondary schools; Further Education Licenses for colleges of further education and sixth form centres; Higher Education License for universities and other higher education institutions; Adult Education License for adult education centres and Language Schools License for UK language schools. As part of its activities, the Agency has entered into various arrangements with local educational authorities, universities, colleges and other user institutions. The terms of the CLA are subject to the jurisdiction of the Copyright Tribunal and the licensing arrangements are subject to three provisions: Reprography schemes and other licences are subject to a statutory implied indemnity by the licensor covering infringement of any work which the license purports to cover in its

blanket but which is in fact not within the licensor's authority to grant.[44]In relation to instruction in educational establishments, the Secretary of State has power to order the extension of a license or scheme to cover works which are similar and are unreasonably excluded.[45]The Secretary of State may establish an inquiry to decide whether a scheme or general license should be established for a category of literary, dramatic, musical or artistic work not covered.[46]Though this system was a welcome step for resolving the issue of reprography to some extent but the increase rates of levy by the CLA over the years have been a matter of dispute before the courts which make this levy system weak. In *University UK v. Copyright Licensing Agency*, [47]the Association of University Vice-Chancellors successfully challenged the Copyright Licensing Agency demand for increased rates under their standard agreements. The proposed annual amount per student was lowered and the scheme for casebooks was heavily criticized by the Tribunal. Therefore, though this system of licensing seems to safeguard the interest of the owners of the copyright materials from the loss that they have to suffer because of the reprography techniques but the levy system has always been a matter of dispute regarding the increase of the fee and the grounds on which it is proposed to increase such fee. India: Sections 33 and 34 of the Indian Copyright Act, 1957 deal with registration of copyright society and administration of rights of owners by copyright society. There are various copyright societies existing in India like Society for Copyright Regulation of Indian Producers for Film and Television (SCRIPT) for cinematograph and television films; Indian Performing Right Society Limited (IPRS) for musical works and Phonographic Performance Limited (PPL) for sound recording. The

administration of these societies have always been a matter of dispute to the extent that constitutional validity of sections 33 and 34 have been challenged before the court of law (though unsuccessfully) on the ground that section 34 gives uncontrolled and unregulated powers to the copyright societies specifically in relation to the tariff in cases like *The Federation of Hotels & Restaurants Association v. Union of India*[48] and *Event and Entertainment Management v. Union of India*.[49] However, to bring certain amount of transparency in formulation of tariff scheme by the copyright societies, section 33A has been inserted by the Copyright Amendment Act, 2012.[50] In India, like other countries, there exists Reprographic Reproduction Organization (RRO) which was established as a copyright society under section 33(3) of the Copyright Act, 1957.[51] Under this particular provision, the Indian Reprographic Rights Organization (IRRO) was incorporated in the year 2000, with the active participation of 'Authors Guilds of India' and 'The Federation of Indian Publishers'. It was authorized by the Central Government to commence and carry on the copyright business in 'reprographic rights' in the field of literary works and it represents the rights owners of the literary works i. e. the authors and the publishers and provides licenses to the user on their behalf.[52] Rules of IRRO mandate all corporate bodies, reprography shops, libraries, educational institutions etc. to take 'reprographic usage' licenses from IRRO on payment of prescribed tariff.[53] The IRRO list various benefits of obtaining license which includes copying of content from Indian Publications as well as those from other countries; reduction of risk and potential cost of copyright infringement; allows scanning and maintaining digital copies; allows the

distribution of photocopy and digital copies in the secured network of the organization; and allows making photocopies of a photocopy.[54]Therefore, IRRO (after taking license) permits multiple copying and the distribution of the same within the organization but this is subject to various limitations. [55]The major limitation so imposed by the IRRO is that licensee can make no more than twenty copies and not more than ten percent or one chapter of any publication per year whichever is the greater. Further, the licensee must own an original or copyright fee-paid of any licensed material it copies; licensed copy is not to be made or used for the delivery of education or training of any third parties of the licensee but may be made and used for the training of the authorized persons provided that the licensee shall not receive any consideration or any other form of remuneration.[56]