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OXFORD UNIVERSITY V. RAMESHWARI PHOTOCOPY SERVICES - RESHAPING THE COPYRIGHT DISCOURSE

*Kartik Chawla**

I. INTRODUCTION

The central purpose of copyright law is to ensure that the creation of intangible creative works is consistently incentivised, even where the nature of these works themselves may not quite allow for it. The ‘means’ for this are the limited monopolies; the ‘end’, however, is that these works actually be consumed or actually be read. It is not only the creation of these works that is crucial, but it is also immensely crucial that the works be *accessible* (a word with multiple strata of meanings) to the masses.

The Indian copyright law is not clear on whether copyright is a natural right or a statutory creation.¹ However, it is important to remember that the justifications for copyright are based on the creation of an ‘artificial’ market for a specific category of such intangible works through state-given sanction for limited monopolisation.

Copyright, therefore, requires a balance between the limited monopolies given to the authors of these works and the access given to the consumers. However, in the last few decades, the focus and perspectives of the copyright owner and of ‘private property’ have been dominantly influential in copyright law.² This has arguably been particularly relevant due to the major

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¹ Prashant Reddy, ‘Counterview – The DU Photocopy Case – How Wide Should Educational Use Exceptions be in the Age of Photocopier Machines?’ (SpicyIP, September 19, 2016), available at <https://spicyip.com/2016/09/counterview-the-du-photocopy-case-how-wide-are-educational-use-exceptions-in-the-age-of-photocopier-machines.html> (Last visited on March 31, 2017).

² Lawrence Liang, *Exceptions and Limitations in Indian Copyright Law for Education*, 3(2) LAW AND DEVELOPMENT REVIEW 197, 210 (2010).

reduction of costs involved in production and reproduction of intangible works with the evolution of ICTs.

This essay analyses the judgment of the Division Bench of the Delhi High Court in the case of *University of Oxford v. Rameshwari Photocopy Services*³ from the perspective of fair use and the public domain, and the importance of the educational exceptions in contrast with the private property and trade-centric discourse of copyright. The essay is divided into five parts. After the introduction, the second chapter discusses the importance of commons in the core philosophy of copyright law, and how this has been subsumed by the private property discourse in the recent decades. The third chapter provides a brief summary of the judgment, and then analyses its implications in the context of these competing discourses. The fourth chapter responds to certain critiques of the judgment. The final chapter concludes the essay, noting that the perspective taken in the judgment is a significant victory for the commons discourse over the private property discourse. It notes that while there is a fair critique for the blow that has been dealt here to the financial incentives for authors and publishers and we must find ways to incorporate new methods of creating such incentives, the judgment allows us to approach this from a commons-based perspective, which is crucial in itself.

II. THE COPYRIGHT DISCOURSE AND THE COMMONS

The theories and jurisprudence of a legal regime necessarily have a quintessential structural influence on the regime in question. But, when we analyse legal regimes closely we find that this structural influence is, in some cases, lacking. Legal structures sometimes work without taking into account the context and the reality adequately,⁴ and this lacuna can be very dangerous to the very evolution of the law.

Copyright law is, broadly, a statutory creation intended to create artificial incentives for the creation of more ‘intangible’ content. It is meant to protect the rights and interests of the authors and publishers, but at the same time, it is also meant to support the commons,⁵ to support access to this content for the masses, particularly for the purpose of education. This harkens back

³ University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229.

⁴ Margaret Davies, *ASKING THE LAW QUESTION*, 96 (3rd edn., THOMSON, Law Book Company of Australia 1994).

⁵ William T. Fisher, ‘The Theories of Intellectual Property’, available at <https://cyber.harvard.edu/people/tfisher/iptheory.pdf> (Last visited on March 31, 2017).

to the first copyright statute itself, i.e., the Statute of Anne,⁶ and even the first copyright act in the United States (US).⁷ The theories of copyright, in all their variations, require a healthy, burgeoning commons.⁸

The commons plays an integral and often underestimated role in the copyright system. Not only is the commons necessary for ensuring that copyrighted works are more than mere inaccessible books locked behind chains of unaffordability (in which they are helped by market competition), the commons is also the most significant source of ‘material’ from which the copyrightable works are drawn to begin with.

A work is considered to be in the public domain or ‘commons’ if it does not qualify for any copyright protection at all, i.e., there is no copyright on it, and any person can use it as he or she deems fit. ‘Fair use’, on the other hand, carves out certain situations in which a person can make use of even a copyrighted work, and to that extent the copyright is suspended. A key problem in recent decades, however, has been that fair use has come to be seen as a ‘defence’ to claims of copyright infringement, of infringement of the ownership of private property. What is ignored here is the fact that fair use is actually a *right*, an essential part of the copyright law itself. Fair use is, in a way, the gateway to the commons, rather than a mere defence to claims of ownership of intellectual property.

Going one step beyond the pure commons, however, we come to the thorny condition of one of its most significant tools in fair use: “*educational exceptions*”. Educational exceptions play a fundamental role in copyright law, working as they do at the intersection of a host of societal factors. The importance of educational exceptions for access to information and even the right to education has been much debated and discussed.⁹ At the same time, educational exceptions also cover a rather sensitive and difficult market, with continued and consistent ‘incentivisation’ being crucial for the creation of more significant works and with authors struggling to fully capitalise

⁶ Lawrence Liang, *The Essence of Education*, THE HINDU (December 13, 2016), available at <http://www.thehindu.com/opinion/lead/The-essence-of-education/article16798107.ece> (Last visited on March 31, 2017).

⁷ Mike Masnick, ‘Copyright Week: Open Access as the Antidote to Privatizing Knowledge and Learning’ (TechDirt, January 15, 2014), available at <https://www.techdirt.com/articles/20140115/11022325887/copyright-week-open-access-as-antidote-to-privatizing-federally-funded-knowledge.shtml> (Last visited on March 31, 2017).

⁸ Kartik Chawla, ‘Authors’ Guild v. Google – A Fair Use Victory, and a Chance for Introspection’ (SpicyIP, November 8, 2015), available at <https://spicyip.com/2015/11/authors-guild-v-google-a-fair-use-victory-and-a-chance-for-introspection.html> (Last visited on March 31, 2017).

⁹ Liang, *supra* note 2, at 209.

upon their works.¹⁰ Added to this, the Indian education scenario makes this a particularly arduous exercise.¹¹

However, the discourse in copyright law has largely been dominated by the perspective of the copyright owner, by the discourse of ‘private property’, particularly since the last few decades.¹² This focus is particularly evident in the fact that while the monopoly created by copyright has been seen as the norm or as ‘the rule’ in the recent past, tools of the commons are defined as the ‘exceptions and limitations’ despite strong contentions to the contrary.¹³ Fair use and fair dealing, in many ways and across jurisprudences, are depicted as “*defences*” to infringement, and not as equal participants in the process with private law. There has been a growing call from theorists and from the civil society to recognise the fact that this discourse is skewed and that the rights of the owner are not the sole or even the dominant perspective in copyright law.¹⁴ As Locke’s famous, and underused, proviso puts it, a person may legitimately acquire property rights by mixing his ‘labour’ with resources held in the ‘commons’ only if that leaves “*enough and as good in commons for others*”.

There needs to be an active recognition of the fact that the commons is not the result of the ‘exception and limitations’ of copyright law, but that it is an integral part of the copyright regime *per se*. We need to recognise that although copyright law is meant to protect the rights of the users and incentivise them to create more, at the same time, it is also meant to ensure that the public in general can *access* these creations, particularly in the education sector. We need to consider the commons to be as significant a part of the copyright regime as the rights of the owners themselves.

¹⁰ Prashant Reddy, ‘Counterview: The Outcome of the DU Photocopy Case isn’t Necessarily Good News for Higher Academia in India’ (SpicyIP, September 19, 2016), *available at* <https://spicyip.com/2016/09/counterview-the-outcome-of-the-du-photocopy-shop-isnt-necessarily-good-news-for-higher-academia-in-india.html> (Last visited on March 31, 2017).

¹¹ Liang, *supra* note 2, at 210.

¹² Lawrence Liang, ‘The Radical Significance of the DU Photocopy Case for Global Copyright’ (Kafila Online, September 20, 2016), *available at* <https://kafila.online/2016/09/20/the-radical-significance-of-the-du-photocopy-case-for-global-copyright/> (Last visited on March 31, 2017); Philip G. Altbach, *Knowledge Enigma: Copyright in the Third World*, 21(37) ECONOMIC AND POLITICAL WEEKLY 1643 (September 13, 1986).

¹³ Dinusha Mendis, *The Historical Development of Exceptions to Copyright and its Application to Copyright Law in the Twenty-First Century*, 7(5) ELECTRONIC JOURNAL OF COMPARATIVE LAW (2003), *available at* <https://www.ejcl.org/75/art75-8.html> (Last visited on March 31, 2017).

¹⁴ Altbach, *supra* note 12.

III. OXFORD UNIVERSITY V. RAMESHWARI PHOTOCOPY SERVICES – AN ANALYSIS

The copyright infringement petition in the case at hand was filed by three publishers, Oxford, Cambridge and Taylor Francis, in August 2012 against Rameshwari Photocopy Services (a photocopy shop located on the Delhi University campus) and the Delhi University itself. Interventions in the case were filed by the Association of Students for Equitable Access to Knowledge ('ASEAK') and the Society for Promoting Educational Access and Knowledge ('SPEAK'). The argument of the petitioners here was that the creation of course packs, including the photocopying of copyrighted materials required for the same, was an infringement of the exclusive copyright of the authors and publishers. The defendants, on the other hand, argued that this fell within the exception to copyright provided for under S. 52(1)(i) of the Copyright Act, 1957.

These course packs were compilations of excerpts from academic publications, including publications from the petitioners, which were part of the official syllabus of the Delhi University. A master copy was created by the University from the original books that it had purchased, and photocopies of the same were issued to the university students by the photocopy shop.

The Division Bench judgment was written by Justice Nandrajog, and delivered by a bench comprising of Justice Nandrajog and Justice Khanna on December 9, 2016 ('Oxford II'). It was a decision on the appeal filed by the petitioners in the case against Justice Endlaw's Single Bench judgment delivered on September 16, 2016 ('Oxford I'). The appeal judgment was delivered after what feels to be a preternaturally quick appeals process, especially anomalous in the infamously slow Indian judicial system.¹⁵

Justice Endlaw had ruled in favour of the respondents in the case, i.e., *Rameshwari Photocopy Services and others*, stating that the photocopying involved was covered under education exception embodied in S. 52(1)(i) of the Copyright Act, 1957. The Single Judge Bench had found no triable issue on fact and dismissed the case outright.

The Division Bench, in its judgment, largely concurred with the findings of the Single Bench, but there were some crucial differences. While the Single

¹⁵ Shamnad Basheer, 'Publishers vs Pupils: Delhi High Court has Struck a Blow for the Right to Copy Copyrighted Material' (Scroll.in, December 13, 2016), available at <https://scroll.in/article/823996/publishers-vs-pupils-delhi-high-court-has-struck-a-blow-for-the-right-to-copy-copyrighted-material> (Last visited on March 31, 2017).

Bench found no triable issue, the Division Bench did find triable issues and remanded the same back to the Single Bench.

The Division Bench proposed the legal issue which arise for consideration to be: whether the right of reproduction of any work, by a teacher or a pupil, *in the course of instruction*, is absolute, and not limited by the condition of ‘fair use’. The sub-question that the Bench identified was regarding the span of the phrase “*by a teacher or a pupil in the course of instruction*”. It identified the issues regarding ‘reproduction and publication’ as sub-issues.¹⁶ It also dealt with the status of Rameshwari Photocopy as an ‘intermediary’ for the unauthorised photocopying,¹⁷ and with the question of whether the University had given ‘official sanction’ to the photocopying.

Rejecting the arguments of the appellant-plaintiffs regarding a narrow interpretation of ‘instruction’, the Division Bench upheld a broader reading of the term, citing the Parliamentary debates that led to the enactment of the 2012 amendments. Vitally, in this and in rejecting the distinction between textbooks and course packs, and throughout the judgment, the Bench takes pains to emphasise the importance of education as a whole as well as of access to education, particularly in the Indian context.¹⁸

While the Bench found the principle of fairness to be an essential aspect of the copyright statute, it rather favoured the general principle of fair use over the four-part test that was argued for by the appellant-petitioner.¹⁹ The Bench stated that, “*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*

¹⁶ University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229, ¶17.

¹⁷ University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229, ¶60.

¹⁸ University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229, ¶28 & ¶30,

“30. *The importance of education lies in the fact that education alone is the foundation on which a progressive and prosperous society can be built. Teaching is an essential part of education, at least in the formative years, and perhaps till post-graduate level. It would be difficult for a human to educate herself without somebody : a teacher, helping. It is thus necessary, by whatever nomenclature we may call them, that development of knowledge modules, having the right content, to take care of the needs of the learner is encouraged. We may loosely call them textbooks. We may loosely call them guide books. We may loosely call them reference books. We may loosely call them course packs. So fundamental is education to a society – it warrants the promotion of equitable access to knowledge to all segments of the society, irrespective of their caste, creed and financial position. Of course, the more indigent the learner, the greater the responsibility to ensure equitable access.(emphasis supplied)”.*

¹⁹ University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229, ¶ 31.

of education.”²⁰ This, in itself, is very significant as the four-part test represents a fairly private property-centric view of the exceptions to copyright law. The purpose test, on the other hand, prioritises education and access over market considerations, seeing the educational exceptions as more central to the copyright regime than mere ‘exceptions’.

On ‘publication’ and ‘reproduction’, the Division Bench accepted a narrower interpretation of ‘public’ with regard to the niche market for publications rather than the view taken by the Single Judge Bench.²¹ However, it went on to hold that a ‘publication’ has an element of profit which it found to be lacking, taking judicial notice of the fact that the average price for photocopies in the relevant time period was 50 paise per page, while Rameshwari Photocopy had agreed to charge only 40 paise per page. It also went on to state that if ‘reproduction’ includes the plural, it cannot be held that making multiple copies, i.e., ‘publication’, will not be permitted.²²

Finally, as mentioned earlier, the Division Bench found the quantum of copying to be a triable issue on facts, and remanded the same to the Single Judge Bench.

The Court recognised the importance of the educational exceptions at multiple occasions in the judgment, including:

*“36. It could well be argued that by producing more citizens with greater literacy skills and earning potential, in the long run, improved education expands the market for copyrighted materials.”*²³

The importance given by the Court to the educational exception is put most succinctly in one of the most famous paragraphs of this judgment:

“76. A lay person may question as to how a provision in a statute results in an interpretation where a right conferred on a person to use the work of another without any compensation would be just and fair. The question would obviously arise: Is it possible that a provision in a statute partially drowns another provision. This lay person would obviously desire, and perhaps logic would feed the desire, that

²⁰ University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229, ¶ 33.

²¹ University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229, ¶ 57.

²² University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229, ¶ 57 & ¶ 60.

²³ University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229, ¶ 36.

no provision should be drowned or partially drowned. After all, in the melody of the statute all notes should be heard.

77. We therefore answer this question, which certainly arises, using the imagery of music. A melody is the outcome of the sounds created when different instruments, such as a lute, flute, timbale, harp and drums are played in harmony. The notes of the instruments which are loud and resonating have to be controlled so that the sound of the delicate instruments can be heard. But it has to be kept in mind that at proper times the sound of the drums drowns out the sound of all other instruments under a deafening thunder of the brilliant beating of the drums. Thus, it is possible that the melody of a statute may at times require a particular Section, in a limited circumstance, to so outstretch itself that, within the confines of the limited circumstance, another Section or Sections may be muted. (emphasis supplied)²⁴

As this extract clarifies, it is at some occasions necessary for certain provisions of the statutory copyright law to be ‘muted’ so that other sections, in this context the educational exception, can be given the overriding importance the context deserves. This interpretation of the fair use exceptions for education clearly and strongly emphasises the importance of fair use even over the significance of the ‘private property’ of copyright owners, in turn emphasising the right to education over copyright ownership.

The judgment is also momentous insofar as it relies strongly on the leeway allowed to countries under the TRIPS (The Agreement on Trade-Related Aspects of Intellectual Property Rights) and Berne Conventions. Whether it has violated the same, however, is a question that has not been dealt with herein.

IV. A RESPONSE TO CRITIQUES

One major critique of the judgment delivered by the Single Judge Bench has been the absolute breadth of photocopying allowed under it.²⁵ This cri-

²⁴ University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229, ¶ 76 & ¶ 77.

²⁵ Prashant Reddy, ‘Counterinterview – The DU Photocopy Case – How Wide Should Educational Use Exceptions be in the Age of Photocopier Machines?’ (SpicyIP, September 19, 2016), available at <https://spicyip.com/2016/09/counterinterview-the-du-photocopy-case-how-wide-are-educational-use-exceptions-in-the-age-of-photocopier-machines.html> (Last visited on March 31, 2017); Mathews P. George & Chithra P. George, ‘A Critique of Delhi High Court Judgment in DU Photocopy Case’ (LiveLaw.in, October 6, 2016), available at <http://www.livelaw.in/critique-delhi-high-court-judgment-du-photocopy-case/> (Last visited on March 31, 2017).

tique argues that the Court has taken too liberal an approach, and that the narrative here had become one of binaries – either the defendants and ‘fair use’, and access to education with them, prevailed or the petitioners prevailed, which meant that each student would be charged at the full price of each book.²⁶ The argument here is that the Court could have taken a more ‘balanced’ approach. It could have perhaps delineated circumstances when unauthorised photocopying would be allowed and circumstances for the use of compulsory licences where access still remained a problem, or perhaps pair a similar breadth of permission for photocopying with the University paying the publishers through a licensing arrangement.

These criticisms raise a fair point, but they arguably fail to see the true dearth of accessibility of education in India. This case affects not just Delhi University, but every educational institution in the country, and directly ties into the right to education mentioned in the Indian Constitution. Furthermore, this critique underestimates the importance of this case in establishing the priority of the commons-based discourse over the private property discourse. This issue has been addressed, to some extent, by the Division Bench judgment, as discussed below.

A second critique against both these judgments has been that the market for academic publishing is a very small market, and paying publishers arguably nominal amounts for the creation of course packs through photocopying would not only have been too costly on the consumer end, but could lead to substantial benefits for the publishers and authors.²⁷ This would lead to greater incentives for authors and publishers to engage with Indian scholarships, and consequently would lead to an improvement in Indian scholarship.

Of course, while the market size may not increase as a result of this judgment, it definitely is not decreasing either. This practice, of photocopying, had been significantly widespread in India even before the judgment, which is exactly why the judgment was considered as important as it was. However, the concern is not simply that the status quo will be maintained, but that the lack of this monetisation creates a *disincentive* for publishers in directing their resources towards Indian scholarship, and would lead to publishing

²⁶ Maanav Kumar, ‘The Copyright Imbalance in the DU Photocopy Case’ (TheWire.in, September 29, 2016), available at <https://thewire.in/69358/du-photocopy-case-not-balanced/> (Last visited on March 31, 2017).

²⁷ Prashant Reddy, ‘Counterview: The Outcome of the DU Photocopy Case isn’t Necessarily Good News for Higher Academia in India’ (SpicyIP, September 19, 2016), available at <https://spicyip.com/2016/09/counterview-the-outcome-of-the-du-photocopy-shop-isnt-necessarily-good-news-for-higher-academia-in-india.html> (Last visited on March 31, 2017).

resources being diverted away from it, towards more economically feasible markets. This, it argues, can lead to lesser competition in Indian academia.²⁸

The answer to this critique is slightly roundabout. *First*, while the critique proposes a nominal charge for photocopying and the publishers in this case did ask for a nominal amount, there is a strong argument to be made that this amount would not have remained nominal if left to the free market. Setting this amount by judicial diktat would also be possible, but would lead to its own set of complications²⁹ – issues of pricing are arguably some of the most complicated ones in Intellectual Property law.

Second, is the balance I referred to earlier, between access and incentivisation. The publishing market is inherently skewed against third world countries in many ways, and India faces substantial problems in ensuring access to education for its 1.2 billion strong population, particularly due to its socioeconomic stratification. A 2012 study shows that the absolute costs of books are often higher in the global ‘South’ than the global ‘North’, and consumers in the ‘South’ have to contribute significantly higher proportions of their income to buy books.³⁰ As the study notes, on equating the cost of books with the proportion of income they would form for an Indian consumer with an American consumer, the American consumer would be charged \$440.50 for a copy of Arundhati Roy’s ‘*God of Small Things*’, which is likely to raise a lot of questions. However, an Indian consumer paying \$6.60 for the same book would not be considered problematic, even though the latter is the equivalent of the former by the proportion-of-income argument.³¹ According to the study, if American consumers had to pay the same proportion of their income towards such books as their African and Indian counterparts, the equivalent prices would be ridiculous.³² These disparities are enormous, and the people worst affected by this are specifically the ones who need access to education the most. They cannot and must not be ignored.

Third, while the judgment of the Single Judge Bench allowed quite a broad room for unauthorised photocopying, the judgment of the Division Judge Bench is arguably more tempered. The judgment itself did not go into

²⁸ Prashant Reddy, ‘Counterinterview: The Outcome of the DU Photocopy Case isn’t Necessarily Good News for Higher Academia in India’ (SpicyIP, September 19, 2016), available at <https://spicyip.com/2016/09/counterinterview-the-outcome-of-the-du-photocopy-shop-isnt-necessarily-good-news-for-higher-academia-in-india.html> (Last visited on March 31, 2017).

²⁹ Michael J. Sandel, *JUSTICE: WHAT’S THE RIGHT THING TO DO?*, 82 (Penguin Books 2010).

³⁰ Liang, *supra* note 2, 206.

³¹ Liang, *supra* note 2, 206.

³² Liang, *supra* note 2, 206 (As of 2012, Nelson Mandela’s ‘*Long Walk to Freedom*’ would cost \$1027.50, while the Oxford English Dictionary would cost \$941.20.).

it in detail, but it limited the amount of photocopying to only that which is necessary for the ‘purpose’ of the ‘course of instruction’.³³ The Court did not tell us how this necessity is to be ascertained, but it remanded the matter to the Single Judge Bench to deal with exactly the same issue, and left it open for determination. It explicitly stated that the issue of “*whether photocopying of entire books would be a permissible activity*” remained open to determination,³⁴ and seemed to refer to the ‘yearly release’ limitation of the *Longman* judgment³⁵ with approval.³⁶ This test remains open-ended at the moment, but that is arguably no better or worse than the issue of pricing of the photocopying being open ended.

Which brings me to my *fourth* point– the inherent assumption in this market-based critique is that the market size would *increase* if charges were attached to unauthorised photocopying. As long as this charge is limited to a nominal value, it would arguably be viable from the access perspective though the capital gained may not be too substantial. However, the fact is that as far as the market for the actual publications in question is concerned, a vast majority of the people, who can now access at least portions of them, would not have been able to purchase the books in the first place. A large number of people who would benefit from this exemption were not potential ‘customers’ to begin with.

The only change would have been that the universities or the students would have had to pay a certain extra amount, nominal or otherwise, to access even their courses in a country already suffering from hurdles in providing access to education.³⁷ Where you have an absolute inability to afford books coupled with a *need* to access the books, particularly for something as vital as education, you end up with a positive effect on piracy.³⁸ And, ‘unable to afford’ is a very wide and critical category in India. Variations in socio-economic status coupled with the massive population results in a lot of people, particularly those especially in need of education, being unable to afford even low-priced books. Furthermore, if the Court had accepted the restricted quantum of fair use argued by the petitioners, the restrictive

³³ University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229, ¶ 56.

³⁴ University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229, ¶ 79.

³⁵ Longman Group Ltd. v. Carrington Technical Institute Board of Governors, (1991) 2 NZLR 574.

³⁶ University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229, ¶ 53.

³⁷ Pheroze L. Vincent, *JNU Slashes Research Seats*, THE TELEGRAPH (March 22, 2017), available at https://www.telegraphindia.com/1170322/jsp/nation/story_142010.jsp#.WN5Uk76P-Mo (Last visited on March 31, 2017).

³⁸ Liang, *supra* note 2, 209.

effects would have been severely compounded.³⁹ A potential argument, one that the Court also makes, is that if more people can access extracts of those books, there is a higher chance of them buying the books,⁴⁰ especially if combined with access to education resulting in an improvement of socio-economic circumstances.

And finally, *fifth*, it is still clear that the critique raises a relevant point, and that the Indian academia can do with some incentivisation for publishers. However, the judgment marks important victories for educational exceptions in copyright law, for the commons discourse, and for access to education, and a necessary reshaping of the copyright discourse. If a method of reaching this end, i.e., of making Indian academia more appealing, can be found without rolling back this judgment to legally allow for publishers charging on photocopying, it must be preferred in practice. Photocopying, as a tool for reproducing content to support education, is a weighty tool that should not be hampered simply because its effect was not predicted when the laws were being conceived. It is important, of course, to incentivise the creation of academic works and to recompense the authors for the use of their work. However, it would be better to approach this issue from the commons perspective, as the Court has, and then buttress the incentivisation as much as possible, arguably through a system of ‘contributions’ based on ability-to-afford, rather than to shift its costs onto those who are already struggling. For instance, a voluntary contribution system similar to the Creative Commons system can be set up at Universities, or made available online; or, alternative payment methods like the Patreon system can be considered.⁴¹ These methods would be much better than a legally mandated duty to pay, which would necessarily increase the base costs associated with education, but would still allow a method for recompense to authors and publishers.

V. CONCLUSION

While this judgment and the analysis herein are focused on the Indian context, it is important to note that the property-centric view of intellectual

³⁹ Lawrence Liang, *The Essence of Education*, THE HINDU (December 13, 2016), available at <http://www.thehindu.com/opinion/lead/The-essence-of-education/article16798107.ece> (Last visited on March 31, 2017).

⁴⁰ University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229, ¶ 36,

(“...It could well be argued that by producing more citizens with greater literacy skills and earning potential, in the long run, improved education expands the market for copyrighted materials”).

⁴¹ Patreon HelpDesk, ‘What is Patreon’, available at <https://patreon.zendesk.com/hc/en-us/articles/204606315-What-is-Patreon> (Last visited on March 31, 2017).

property is not an issue faced by India alone. Even in the education sector, strong moves towards the chaining of academic research in terms of ‘property’ have been facing protests across borders.⁴² This has been true even in the West, with the judgment of the US Supreme Court in *Authors Guild v. Google* similarly promoting a *right* to fair use, though in a different factual situation.⁴³

At the same time, the increasing severity and cost of paywalls and other restrictions on access to academic works have been criticised across the world,⁴⁴ with Elsevier being the subject of much critique.⁴⁵ Many academicians and activists have, in fact, gone so far as to oppose these restrictions by making many articles available for free or creating tools for finding free versions of articles.⁴⁶ Further, the consistently increasing support for the Open Science and Open Access movements speaks for itself.⁴⁷

We live in an era where technology allows us to share information at rates that could barely be dreamt of decades ago. From massive computer with minuscule processing powers, we have come to an era where any device can

⁴² Mike Masnick, ‘Reminder: Fair Use is a Right – And not ‘An Exception’ or ‘A Defense’ (TechDirt, February 23, 2015), available at <https://www.techdirt.com/articles/20150222/16392430108/reminder-fair-use-is-right-not-exception-defense.shtml> (Last visited on March 31, 2017); Mike Masnick, ‘Copyright Week: Our Lost Culture: What We Lose from Having Killed the Public Domain’ (TechDirt, January 14, 2015), available at <https://www.techdirt.com/articles/20140114/10565225874/copyright-week-our-lost-culture-what-we-lose-having-killed-public-domain.shtml>.

⁴³ Kartik Chawla, ‘Authors’ Guild v. Google – A Fair Use Victory, and a Chance for Introspection’ (SpicyIP, November 8, 2015), available at <https://spicyip.com/2015/11/authors-guild-v-google-a-fair-use-victory-and-a-chance-for-introspection.html> (Last visited on March 31, 2017).

⁴⁴ Glyn Moody, ‘Unpaywall: The Browser Add-on that Finds (Legal) Free Copies of Academic Papers You See as You Browse the Web’ (TechDirt, March 21, 2017), available at <https://www.techdirt.com/articles/20170319/02251236949/unpaywall-browser-add-on-that-finds-legal-free-copies-academic-papers-you-see-as-you-browse-web.shtml> (Last visited on March 31, 2017).

⁴⁵ Mike Masnick, ‘Disappointing: Elsevier Buys Open Access Academic Pre-Publisher SSRN’ (TechDirt, May 17, 2016), available at <https://www.techdirt.com/articles/20160517/13513134465/disappointing-elsevier-buys-open-access-academic-pre-publisher-ssrn.shtml> (Last visited on March 31, 2017).

⁴⁶ Glyn Moody, ‘Unpaywall: The Browser Add-on that Finds (Legal) Free Copies of Academic Papers You See as You Browse the Web’ (TechDirt, March 21, 2017), available at <https://www.techdirt.com/articles/20170319/02251236949/unpaywall-browser-add-on-that-finds-legal-free-copies-academic-papers-you-see-as-you-browse-web.shtml> (Last visited on March 31, 2017).

⁴⁷ Vasundhara Majithia, ‘Open Access IP Course Books’ (SpicyIP, September 15, 2016), available at <https://spicyip.com/2016/09/open-access-ip-course-books.html> (Last visited on March 31, 2017); Mike Masnick, ‘Copyright Week: Open Access as the Antidote to Privatizing Knowledge and Learning’ (TechDirt, January 15, 2014), available at <https://www.techdirt.com/articles/20140115/11022325887/copyright-week-open-access-as-antidote-to-privatizing-federally-funded-knowledge.shtml> (Last visited on March 31, 2017).

tap into the power of a literal, modern supercomputer over the Cloud.⁴⁸ The evolution of technology has led us to a democratisation of the means of content creation, with every individual now being capable of tasks that required entire industries.⁴⁹ Content creation, copying and reproduction are getting easier every day across industries, and the easier it gets to ‘copy’, the harder it will be to control ‘copying’. In such an era, a property-centric view of copyright can hobble the sharing of information and education from reaching its true potential. It is important, therefore, to reframe the balance between the private property discourse and the commons discourse in favour of the latter, particularly in the context of education, so that we can ensure as much access to information and education as is practically feasible. Putting profit before educational access, in such scenarios, is very much akin to putting the cart before the horse.

At this point, it must be noted that the Oxford University Press, Cambridge University Press and Taylor & Francis have withdrawn their suit after the Division Bench judgment, and have stated in their Joint Press Statement that, “*We look forward to working even more closely with academic institutions, teachers and students to understand and address their needs, while also ensuring that all those who contribute to and improve India’s education system—including authors and publishers—continue to do so for the long term.*”⁵⁰

The recognition granted to educational exceptions, to *the need for accessibility*, in the Division Bench judgment counts as a momentous victory in this regard. It is particularly important to note that the judgment adopts a perspective on fair use that sees it as a *right*, and not as a mere defence, which is a significant step forward for the commons discourse.

There are issues yet to be addressed, such as the test for what qualifies as the “*extent justified by the purpose*”, which shall hopefully be dealt with by the courts in the future in a similar view. Hopefully, this reframing of the discourse will see a wider application in the Intellectual Property Rights (IPR) jurisprudence as a whole, particularly in other areas as or more crucial than education, such as the pharmaceuticals industry.

⁴⁸ Oliver Chiang, *OnLive Wants to be Your Tablet’s Supercomputer in the Cloud*, FORBES (December 7, 2010), available at <https://www.forbes.com/sites/oliverchiang/2010/12/07/onlive-wants-to-be-your-tablets-supercomputer-in-the-cloud/#68f7b5573692> (Last visited on March 31, 2017).

⁴⁹ Yochai Benkler, *THE WEALTH OF NETWORKS*, 15 (Yale University Press 2006).

⁵⁰ Joint statement by Oxford University Press, Cambridge University Press and Taylor & Francis, (March 9, 2017), available at <http://fdslive.oup.com/asiaed/News%20Items%20and%20Images/Joint%20Public%20Statement.pdf>.

