



2018

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### Recommended Citation

Oke, Emmanuel Kolawole (2018) "The Right-to-Education Responsibilities of Book Publishing Companies," *Indian Journal of Law and Technology*. Vol. 14: Iss. 2, Article 3.

Available at: <https://repository.nls.ac.in/ijlt/vol14/iss2/3>

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# THE RIGHT-TO-EDUCATION RESPONSIBILITIES OF BOOK PUBLISHING COMPANIES

*Emmanuel Kolawole Oke\**

**ABSTRACT** *The responsibilities of copyright owners, specifically book publishers, should be construed from a human rights perspective. Building on the work of John Ruggie and his 'Guiding Principles on Business and Human Rights,' this paper contends that book publishers have a responsibility to respect human rights including the right to education. As it relates to copyright law, respecting the right to education entails respecting the measures that countries have incorporated into their national copyright laws to facilitate access to learning materials. Furthermore, corporate actors that own copyright in learning materials should not use litigation or the threat of litigation to try to prevent teachers and students from relying on limitations and exceptions to copyright to gain access to learning materials.*

## I. INTRODUCTION

What should be the role of copyright law with regard to education and access to learning materials? Should those who own copyright have any responsibility concerning facilitating access to learning materials such as textbooks? What role, if any, can human rights play in negotiating the interface between copyright and access to learning materials? These questions and many more have come to the forefront in the light of recent legal challenges brought by book publishing companies against educational institutions involving the unauthorised use by the latter of copyright protected works belonging to the

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former in the course of teaching and instruction.<sup>1</sup> This paper does not seek to question the role of copyright in incentivising the creation of new and useful works or its role in rewarding creators. It however agrees with the view that, because of the powerful nature of the monopoly conferred by copyright,<sup>2</sup> owners of copyright (including book publishers) should bear certain responsibilities.<sup>3</sup> In this regard, it is crucial to draw a distinction between authors who produce creative works and who may not necessarily always own the copyright in their works on the one hand and copyright owners

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<sup>1</sup> Copyright owners, including book publishers, have sued educational institutions for copyright infringement in a number of countries with varying degrees of success. For cases in the United States, see for instance, *Basic Books Inc. v. Kinko's Graphics Corpn.*, 758 F Supp 1522 (SDNY 1991); *Princeton University Press v. Michigan Document Services Inc.*, 99 F 3d 1381 (6th Cir 1996); *Cambridge University Press v. Patton*, 755 F 3d 87 (11th Cir 2014); *Cambridge University Press v. Mark P. Becker*, 1:08-CV-1425, (ND Ga 2016). For cases in Canada, see for instance, *Law Society of Upper Canada v. CCH Canadian Ltd.*, 2004 SCC OnLine Can SC 13 : 2004 SCC 13; *Province of Alberta v. Canadian Copyright Licensing Agency*, 2012 SCC OnLine Can SC 37 : 2012 SCC 37; *Canadian Copyright Licensing Agency v. British Columbia Ministry of Education*, 2017 FCA 16; *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669. For cases in India, see, *University of Oxford v. Rameshwari Photocopy Services*, 2016 SCC OnLine Del 5128 : (2016) 68 PTC 386; affirmed in part and remanded with instructions on appeal *University of Oxford v. Rameshwari Photocopy Services*, 2016 SCC OnLine Del 6229 : (2017) 69 PTC 123. For some scholarly commentary on this trend, see, Ann Bartow, "Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely", (1998) 60 U. Pitt. L. Rev. 149, 151 (noting that, "Publishers ... have used favorable court decisions and the threat of expensive litigation to coerce commercial photocopiers to pay permission fees for the privilege of making any copies at all, whether or not the use might be a fair one, and in some cases even when the work is not eligible for copyright protection."). See also, Carol Silberberg, "Preserving Educational Fair Use in the Twenty-First Century", (2001) 74 S. Cal. L. Rev. 617; Brandon Butler, "Transformative Teaching and Educational Fair Use after Georgia State", (2015) 48:2 Connecticut Law Review 473.

<sup>2</sup> See, Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property: Mapping the Global Interface*, (Cambridge University Press, 2011), p. 358 (noting that, "copyright law gives powerful legal rights to authors and publishers. These legal rights impose individual duties on the rest of us. We are obliged not to perform the acts that are within the exclusive rights of the copyright owner, including the duties not to reproduce, distribute, or translate copyright-protected works."). See also, Lea Shaver, "Copyright and Inequality", (2014) 92 Washington University Law Review 117, 123 (noting that, "Copyright protection is making cultural works substantially more expensive, impeding translations into other languages, and inhibiting the emergence of open business models that might reach more people in more places. The very doctrines and policies justified as enhancing the incentives for cultural production are unwittingly reinforcing social disadvantage and exclusion from cultural participation."). See further, Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property", (1993) 68:2 Chicago-Kent Law Review 841.

<sup>3</sup> See, Jacqueline Lipton, "Information Property: Rights and Responsibilities", (2004) 56 Florida Law Review 135; Haochen Sun, "Copyright and Responsibility", (2013) 4 Harvard Journal of Sports & Entertainment Law 263.

(like book publishers) who typically wield the monopoly rights conferred by copyright law on the other hand.<sup>4</sup>

It will be argued in this paper that the responsibilities of copyright owners, specifically book publishers, should be construed from a human rights perspective. Importantly, building on the work of John Ruggie and his ‘Guiding Principles on Business and Human Rights’,<sup>5</sup> this paper contends that book publishers have a responsibility to respect human rights including the right to education. As it relates to copyright, respecting the right to education entails respecting the measures that countries have incorporated into their national copyright laws to facilitate access to learning materials.

In analysing book publishers’ responsibilities with regard to the right to education, this paper will be divided into three main parts. The first part will discuss why those who own copyright should bear certain responsibilities. The second part of the paper will thereafter introduce a human rights dimension to the analysis of the responsibilities of copyright owners. It will first critically examine the interface between copyright and the right to education. Thereafter, it will examine the responsibilities of copyright owners (specifically focusing on book publishers) in the light of the UN Guiding Principles on Business and Human Rights. In the light of the analysis in the first and second parts of the paper, the third part of the paper will examine the copyright dispute between Oxford University Press, Cambridge University Press, and Taylor and Francis on the one hand and the University of Delhi on the other hand (hereinafter, the “Delhi University Photocopy case”).<sup>6</sup> The dispute involved the production and sale of course-packs incor-

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<sup>4</sup> As Lawrence Liang notes, “The idea that copyright is a system of balances runs the risk of being a cliché. If the idea of balance has thus far been framed primarily in terms of the provision of incentives to authors versus ensuring that the public has access to works, it might be time to acknowledge that the fault lines lie less in pitting the interest of authors against a robust public sphere and more in the structural arrangements of knowledge production, where private monopolies threaten both authors and the public sphere.” Lawrence Liang, “Paternal and Defiant Access: Copyright and the Politics of Access to Knowledge in the Delhi University Photocopy Case”, (2017) 1:1 Indian Law Review 36, 55.

<sup>5</sup> See, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Human Rights Council, A/HRC/17/31, (21 March, 2011) (noting that the “responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate.”). The UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights in June 2011. See also, John Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton & Co., 2013).

<sup>6</sup> *University of Oxford v. Rameshwari Photocopy Services*, 2016 SCC OnLine Del 5128 : (2016) 68 PTC 386; affirmed in part and remanded with instructions on appeal in *University of Oxford v. Rameshwari Photocopy Services*, 2016 SCC OnLine Del 6229 : (2017) 69 PTC 123.

porating photocopies of extracts of copyright protected works belonging to the above-named book publishing companies. This paper will contend that some of the arguments canvassed before the courts by the book publishers in this case indicate an attitude of disrespect towards the right to education. However, the subsequent decision of the book publishers to withdraw the suit reflects some level of respect for the right to education,<sup>7</sup> albeit a belated one.

The paper will conclude with the view that, as states bear the primary responsibility with regard to the right to education, states should ensure that they incorporate a right-to-education perspective into the design, interpretation, and enforcement of their national copyright laws. However, corporate actors also have a responsibility to respect human rights including the right to education. Thus, companies that own copyright in learning materials (such as book publishers) equally have a responsibility to respect measures that states have introduced into their national copyright laws to facilitate access to learning materials.

## II. COPYRIGHT AND RESPONSIBILITY

In a seminal piece on information property, Jacqueline Lipton suggests a framework for balancing the competing interests between owners of information property and other members of the society.<sup>8</sup> According to Lipton, legal duties ought to be imposed on those who own information property as part of their property ownership in order to provide some protection for other competing interests in information.<sup>9</sup> In her framework, Lipton draws on the law and theory relating to real property as an analogy for intellectual property (although she clarifies that she is not suggesting that ownership of information should be equated with ownership of real property).<sup>10</sup>

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<sup>7</sup> See, Joint Statement by Oxford University Press, Cambridge University Press and Taylor & Francis, (9 March, 2017). Available at <<http://fdslive.oup.com/asiaed/News%20Items%20and%20Images/Join%20Public%20Statement.pdf>>

<sup>8</sup> Jacqueline Lipton, "Information Property: Rights and Responsibilities", (2004) 56 Florida Law Review 135. In her article, Lipton defines "information property" to include "copyrights, patents, trade secret rights, contractual licences revolving around the licensing of proprietary information, and *sui generis* database rights." *Ibid.*, 140, note 24. See also, Jacqueline Lipton, "Protecting Valuable Commercial Information in the Digital Age: Law, Policy, and Practice", (2001) 6 J. Tech. L. & Policy 1, 3-4. Thus, in the context of Lipton's work, "information property" can be taken as being coterminous with what we commonly refer to as "intellectual property".

<sup>9</sup> *Ibid.*, 140.

<sup>10</sup> *Ibid.*, 142.

Lipton notes that rights over real property have never been absolute and have always entailed legal duties owed by the owners to other members of society.<sup>11</sup> Building on this, Lipton queries whether we ought to learn something from real property in terms of the legal duties that can be imposed on those who own rights in information property.<sup>12</sup> While acknowledging that some duties are already imposed on those who own intellectual property (such as the requirement that an invention be disclosed before an inventor can obtain a patent), Lipton contends that the duties currently imposed on owners of intellectual property rights are not enough to “protect specific individuals with competing interests in relevant intellectual property, particularly those with limited means to assert or enforce their interests.”<sup>13</sup> Lipton’s main argument is that those who own intellectual property rights should also bear affirmative duties.<sup>14</sup>

Importantly, one of the specific competing interests that Lipton identifies in her paper is the need to have access to copyright protected works, specifically the need to have access to protected information for educational purposes.<sup>15</sup> If there is any group with limited means to assert or enforce their interests in obtaining access to copyright protected works for educational purposes, it is teachers and students in developing countries with poor purchasing power. Drawing on empirical data from South Africa, Shaver notes that “South Africans of all classes and ethnicities value and enjoy reading, and would prefer to read more often – but they are frustrated in realising this desire by the unaffordably high cost of books.”<sup>16</sup> In the same vein, writing about India, Liang notes that “[i]t is impossible to understand the challenges facing education in India – and the critical importance of copyright law to it – without putting the costs of learning materials into perspective.”<sup>17</sup>

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<sup>11</sup> *Ibid.*, 148.

<sup>12</sup> *Ibid.*, 149 (noting at 165 that, “Property rights in the past have never been absolute, and there is no reason why information property rights should be any different ... We need to start thinking about an overarching policy framework for information property rights that incorporates concurrent legal duties.”).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, 165 (noting that, “...while fair use defenses and statutory limitations on the scope of property rights are useful ways of preserving competing interests in information and protecting the public domain to some extent, their major disadvantage is that they do not impose any significant affirmative duties on the right holder. The onus of establishing that a particular use should be permitted as a fair use, or of proving that a particular right holder is asserting rights beyond the scope granted by the State, will not fall on the right holder. Instead, it will be up to the party attempting to access or use, or to restrict the property holder’s use of, a particular information product to convince a court of these things. Such a party may not have the time, resources, or inclination to take relevant action.”).

<sup>15</sup> *Ibid.*, 139, note 20.

<sup>16</sup> Shaver, (n 2), 131.

<sup>17</sup> Lawrence Liang, “Exceptions and Limitations in Indian Copyright Law for Education: An Assessment”, (2010) 3:2 *The Law and Development Review* 197, 205.

While Lipton's arguments apply to intellectual property in general, another scholar has equally developed a similar argument that specifically focuses on copyright. In his article on copyright and responsibility, Haochen Sun contends that owners of copyright should not just enjoy exclusive rights but also bear social responsibilities.<sup>18</sup> According to Sun, copyright ought to be reconfigured to embody the trinity of values that comprise the right of the copyright owners, user's rights, and the responsibility of copyright owners.<sup>19</sup>

Grounding his argument in the ethical norm of reciprocity, Sun contends among other things that copyright owners should bear responsibilities "as a means of requiring them to respond to others' contributions to the creation and dissemination of their works."<sup>20</sup> Sun presents a socio-centric view of copyright that acknowledges the role of both authors and other members of the society.<sup>21</sup> While recognising that authors play an important role in the creation and dissemination of their works, Sun equally highlights the contributions of other members of the society in the production of copyright protected works by noting that these "others provide cultural artefacts on which an author draw to create new works" and they equally "act as collaborators in disseminating meanings of an author's works."<sup>22</sup>

If copyright owners should bear responsibilities, how would they be held accountable? In response to this, Sun argues that the limitations to copyright should be reconceptualised as responsibilities such that these limitations (such as fair use) would no longer be considered as affirmative defences to claims of copyright infringement.<sup>23</sup> According to Sun, this implies that, in an action for copyright infringement, the copyright owner would have to prove that there has been an unauthorised use of its work and also that this use is not fair use.<sup>24</sup> Sun further suggests that the copyright misuse doctrine<sup>25</sup>

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<sup>18</sup> Haochen Sun, "Copyright and Responsibility", (2013) 4 *Harvard Journal of Sports & Entertainment Law* 263.

<sup>19</sup> *Ibid.*, 267.

<sup>20</sup> *Ibid.*, 282.

<sup>21</sup> *Ibid.*, 287 (noting that, "Works are created in a rich interaction between a creator and the cultural and social context in which he or she is situated."). See also, Christian Stallberg, "Towards a New Paradigm in Justifying Copyright: An Universalistic-Transcendental Approach", (2008) 18 *Fordham Intell. Prop. Media & Ent. L.J.* 333. See further, *Emerson v. Davies*, 8 F Cas 615, 619 (CCD Mass 1845) (No. 4436) where Justice Story observed that "in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before."

<sup>22</sup> *Ibid.*, 285.

<sup>23</sup> *Ibid.*, 306.

<sup>24</sup> *Ibid.*, 307.

<sup>25</sup> See, *Lasercomb America Inc. v. Job Reynolds*, 911 F 2d 970, 977 (4th Cir 1990) applying the decision of the United States Supreme Court dealing with misuse of patent in *Morton*

can be used to penalise copyright owners who fail to accommodate uses of works that are allowed pursuant to limitations to copyright such as fair use.<sup>26</sup>

It is easy to see how Sun's proposed framework might work successfully in an action for copyright infringement instituted by a book publishing company against a poor defendant such as an instructor in an educational institution, especially where, for instance, the instructor's action involves the making of photocopies of protected works for educational purposes. However, Sun's framework can become quite problematic where a poor author with limited resources is trying to enforce his or her copyright against a book publishing company or a film production company. In such a case, it would be unfair to expect the author to bear the burden and cost of proving both copyright infringement and the absence of fair use. Thus, a key flaw in Sun's framework is its failure to consider the impact that requiring copyright owners (which might be authors in some cases) to bear this burden might have on poor creators with limited resources.

It is suggested here that a better approach is to retain limitations to copyright as affirmative defences. However, where it is clear from the facts of a case that a copyright owner is obviously trying to use its copyright to prevent a defendant from enjoying the benefits of limitations to copyright such as fair use, a court could employ the copyright misuse doctrine to penalise such a copyright owner. Thus, where a book publishing company is clearly trying to use its copyright to prevent an educational institution from relying on limitations to copyright, the copyright misuse doctrine can be used to hold the book publishing company accountable for its failure to take into account its responsibility to respect the rights of other members of the society when trying to enforce its copyright.<sup>27</sup>

A natural question that one might ask is whether requiring defendants to prove copyright misuse amounts to placing an additional burden on defendants. This concern can be addressed if courts adopt a proposal suggested by

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*Salt Co. v. G.S. Suppiger Co.*, 86 L Ed 363 : 314 US 488 (1942) to develop a misuse of copyright defence and holding that the grant to the author of the special privilege of copyright forbids the use of the copyright to secure an exclusive right not granted by the Copyright Office.

<sup>26</sup> Sun, (n 18), 314-315.

<sup>27</sup> For a similar argument in relation to the use of the copyright misuse doctrine to deter copyright owners from misusing their copyright to censor the speech of others, see, David Olson, "First Amendment Based Copyright Misuse", (2010) 52 Wm. & Mary L. Rev. 537, 605-606 (contending that courts should use the copyright misuse doctrine "to deter copyright holders engaged in misuse of their copyrights to chill or control the speech of others.").



David Olson in this regard. Olson suggests that courts may presume copyright misuse where the copyright owner's actions negatively affect uses protected by the First Amendment.<sup>28</sup> According to Olson, "courts could say that there is presumptive First Amendment value to the use of copyrighted works for purposes of scholarship, reporting, or commenting on matters of public concern or on public figures; therefore, copyright misuse may be presumed if a copyright holder is found to have taken actions to negatively affect such uses."<sup>29</sup> Olson's proposal can also be extended to the context of access to educational materials in educational institutions. Thus, where a copyright owner's actions negatively affect the ability of an educational institution to gain access to educational materials, courts may presume copyright misuse.

In practice, this would mean that a defendant seeking to rely on the presumption of copyright misuse would need to present evidence indicating that the copyright owner has engaged in conduct that negatively impacts uses related to freedom of expression or access to educational materials.<sup>30</sup> According to Olson, the copyright owner can rebut the presumption of copyright misuse by presenting evidence to show that "it took the actions it did for other legitimate purposes, and not for the purpose of discouraging scholarship, comment, or critique."<sup>31</sup> Once a court finds that there has been copyright misuse, it does not need to determine whether or not the defendant's use falls within the scope of the exceptions to copyright such as the fair use defence.<sup>32</sup>

This approach will ensure that copyright owners think twice before engaging in conducts that could amount to copyright misuse as a finding of misuse could mean that they would be unable to enforce their copyright until they have cured the misuse.<sup>33</sup> It will also make limitations and exceptions to copyright such as the fair use defence more meaningful to defendants.<sup>34</sup> For instance, educational institutions would be able to rely on such limitations and exceptions to gain access to educational materials without having to be concerned about being threatened with a claim for copyright infringement.

This paper however seeks to go beyond the arguments of both Lipton and Sun with regard to the responsibilities of owners of intellectual property rights. Both authors do not incorporate a human rights perspective into their

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<sup>28</sup> *Ibid.*, 601.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, 595-596.

<sup>34</sup> *Ibid.*, 595.

analysis and frameworks. It is however contended here that the application of a human rights framework to the interface between copyright and education can help to define the relationship between copyright owners and other members of the society. Human rights can equally assist in terms of defining the responsibilities of copyright owners and the establishment of mechanisms to hold them accountable for such responsibilities.<sup>35</sup> As Jochnick points out,

“The real potential of human rights lies in its ability to change the way people perceive themselves *vis-à-vis* the government and other actors. Rights rhetoric provides a mechanism for reanalysing and renaming ‘problems’ as ‘violations,’ and, as such, something that need not and should not be tolerated ... Rights make it clear that violations are neither inevitable nor natural, but arise from deliberate decisions and policies. By demanding explanations and accountability, human rights expose the hidden priorities and structures behind violations.”<sup>36</sup>

It is thus contended here that, in relation to those who own intellectual property rights, especially corporate actors that own intellectual property rights, human rights provides a stronger normative basis for the imposition of responsibilities. As will be argued in part two below, corporate actors that own intellectual property rights (including copyright), have a duty to respect human rights including the right to education.

### III. COPYRIGHT IN THE CONTEXT OF BUSINESS AND HUMAN RIGHTS

#### A. Copyright and the Right to Education

Before analysing the human rights responsibilities of corporate actors that own copyright, it is essential to examine the relationship between copyright and the right to education. The right to education is recognised in Article 26 of the Universal Declaration of Human Rights<sup>37</sup> and Articles 13 and 14 of

<sup>35</sup> Writing in the context of health, Alicia Ely Yamin notes that, “what a rights-based approach to health uniquely adds ... lies precisely in the definition of relationships between rights-holders and duty-bearers, which permits the creation of a framework for and mechanisms of accountability, including effective recourse in the event of violations.” See, Alicia Ely Yamin, “Will We Take Suffering Seriously? Reflections on What Applying a Human Rights Framework to Health Means and Why We Should Care”, (2008) 10:1 Health and Human Rights 45, 49.

<sup>36</sup> Chris Jochnick, “Confronting the Impunity of Non-State Actors: New Field for the Promotion of Human Rights”, (1999) 21 Human Rights Quarterly 56, 60.

<sup>37</sup> Art. 26(1) of the Universal Declaration of Human Rights provides that, “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental

the International Covenant on Economic, Social and Cultural Rights.<sup>38</sup> In its General Comment No. 13 on the right to education, the UN Committee on Economic, Social and Cultural Rights (UN CESCR) provides some elaboration on the content and scope of the right to education.<sup>39</sup> The UN CESCR identified four essential components of the right to education: availability, accessibility, acceptability, and adaptability.<sup>40</sup> The focus here will be on availability and accessibility.

Concerning availability, the UN CESCR stated that this requires that “[f]unctioning educational institutions and programmes have to be available in sufficient quantity.”<sup>41</sup> It further noted that what these institutions and programmes will require to function will be dependent on several factors although it stressed that they are all likely to require, among other things, teaching materials and that some will equally need facilities such as a library, computer facilities and information technology.<sup>42</sup> It could thus be argued that learning materials (such as textbooks) will also be required for educational institutions and programmes to function.

In relation to accessibility, the UN CESCR stated that educational institutions and programmes should be accessible to every person.<sup>43</sup> Accessibility here includes economic accessibility, and according to the UN CESCR, this requires that “education has to be affordable to all.”<sup>44</sup> If access to learning and teaching materials is a requirement for functioning educational institutions and programmes, it can be implied that learning materials such as textbooks should also be affordable. Thus, from a human rights perspective, both students and teachers have a right to obtain access to learning and teaching materials at affordable prices. In order for the right to education to have any meaning, teaching and learning materials should not just be available, they should be accessible and affordable.

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stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”

<sup>38</sup> Art. 13(1) of the International Covenant on Economic, Social and Cultural Rights provides that, “The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms....”

<sup>39</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education (Art. 13), E/C.12/1999/10, (8 December, 1999).

<sup>40</sup> *Ibid.*, para 6.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

As noted in the introduction, copyright confers powerful monopoly rights on those who own copyright in protected works. Copyright law, if not carefully designed and implemented, can potentially impede access to teaching and learning materials such as textbooks. National copyright laws should therefore be designed and implemented in a manner that incorporates a right-to-education perspective. Incorporating a right-to-education perspective implies that states do not ignore their human rights obligations when designing and implementing copyright laws. It means taking into account the need to enhance access to teaching and learning materials at affordable prices when designing and implementing copyright laws.

In this regard, it is worth highlighting, as the UN CESCR also notes, that states bear the primary responsibility with regard to respecting, protecting, and fulfilling the right to education.<sup>45</sup> According to the UN CESCR, the obligation to respect the right to education requires states to “avoid measures that hinder or prevent the enjoyment of the right to education.”<sup>46</sup> In relation to copyright law, a right-to-education perspective thus requires that countries should not introduce measures into their national copyright laws that will make it more difficult for teachers and students to gain access to teaching and learning materials. Importantly, any measure that will narrow down the scope of permissible unauthorised uses of copyright protected works for educational purposes should be avoided by states.

The obligation to protect the right to education, according to the UN CESCR, requires states to “take measures that prevent third parties from interfering with the enjoyment of the right to education.”<sup>47</sup> In relation to copyright law, this implies that states are required to ensure that owners of copyright such as book publishing companies do not exercise or enforce their copyright in a manner that interferes with the right of students and teachers to gain access to teaching and learning materials at affordable prices. Importantly, courts, as organs of the state, could use doctrines such as the copyright misuse doctrine (discussed in part two above) as a means of penalising corporate actors that institute copyright infringement suits with the main objective of preventing students and teachers from making permitted unauthorised uses of copyright protected works for educational purposes.

According to the UN CESCR, the obligation to fulfil the right to education requires, among other things, that states should “take positive measures that enable and assist individuals and communities to enjoy the right to

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<sup>45</sup> *Ibid.*, para 46.

<sup>46</sup> *Ibid.*, para 47.

<sup>47</sup> *Ibid.*

education.”<sup>48</sup> As it relates to copyright law, this implies that a state may need to re-examine its copyright law and policy with a view to assessing its impact on access to affordable learning and teaching materials in its country. In this regard, it may become necessary for a state to revise its national copyright law in order to introduce limitations and exceptions to copyright that are aimed at facilitating access to affordable learning and teaching materials.

States thus have a duty to incorporate a right-to-education perspective into the design, amendment, interpretation, and enforcement of their national copyright laws. Importantly, copyright laws should not be designed or enforced in a manner that impedes access to affordable learning and teaching materials. Limitations and exceptions to copyright can play a crucial role in ensuring that copyright does not impede access to teaching and learning materials. Farida Shaheed, the former UN Special Rapporteur in the field of cultural rights, confirms this in her report on copyright policy and the right to science and culture where she notes that limitations and exceptions can “expand educational opportunities by promoting broader access to learning materials.”<sup>49</sup> Shaheed further adds that states “have a positive obligation to provide for a robust and flexible system of copyright exceptions and limitations to honour their human rights obligations.”<sup>50</sup>

There are a number of exceptions and limitations to copyright that states can implement at the national level to facilitate access to teaching and learning materials. Firstly, states could adopt a general exception to copyright such as the fair use provision in US copyright law.<sup>51</sup> Secondly, states could also permit the parallel importation of books pursuant to Article 6 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement).<sup>52</sup> According to Article 6 of the TRIPS Agreement, for the purposes of dispute settlement, nothing in the TRIPS Agreement “shall be used to address the issue of the exhaustion of intellectual property rights.” Thus, states are free to permit the parallel importation of books by adopting the principle of international exhaustion of copyright according to which the copyright in a book becomes exhausted once it is sold anywhere

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<sup>48</sup> *Ibid.*

<sup>49</sup> Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, Copyright Policy and the Right to Science and Culture, A/HRC/28/57, (24 December, 2014), para 64.

<sup>50</sup> *Ibid.*, para 104.

<sup>51</sup> See S. 107 of the US Copyright Act.

<sup>52</sup> On parallel importation and the doctrine of exhaustion, *see generally*, Shubha Ghosh, “The Implementation of Exhaustion Policies: Lessons from National Experiences”, ICTSD Programme on Innovation, Technology and Intellectual Property, Issue Paper No. 40, (November 2013); Peter Yu, “A Spatial Critique of Intellectual Property Law and Policy”, (2017) 74:4 Washington and Lee Law Review 2045, 2067-2073.

in the world.<sup>53</sup> In this regard, it should be noted that even the United States Supreme Court has ruled in favour of the application of the principle of international exhaustion in the context of US copyright law.<sup>54</sup>

Thirdly, states could introduce exceptions to facilitate access for individuals with visual impairments pursuant to the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or otherwise Print Disabled of 2013 (Marrakesh Treaty). The Marrakesh Treaty requires state parties to fulfil two main obligations: one, provide for a limitation or an exception to copyright in order to allow beneficiaries and authorised entities to undertake any changes needed to make a copy of a work in a format accessible for persons with a print disability, and; two allow the cross-border exchange of those accessible copies produced according to the limitations/exceptions.<sup>55</sup> Finally, states could also implement an exception permitting the use of literary and artistic works for teaching purposes pursuant to Article 10(2) of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). A very good model in this regard is Section 52(1)(i)(i) of the Indian Copyright Act which provides that the reproduction of any work “by a teacher or a pupil in the course of instruction” shall not constitute copyright infringement. This particular provision is discussed further in part three below.

## **B. The Responsibilities of Book Publishing Companies to Respect the Right to Education**

Having analysed the obligations of states with regard to the right to education, it is necessary to examine the right to education responsibilities of corporate actors that are copyright owners. In this regard, it should be noted that the UN Human Rights Council has endorsed the view contained in

<sup>53</sup> See, Ghosh, *ibid.*, 9.

<sup>54</sup> See, *Kirtsaeng v. John Wiley & Sons Inc.*, 568 US 519 (2013).

<sup>55</sup> See generally, WIPO, *Main Provisions and Benefits of the Marrakesh Treaty* (2013), (2016), 4. See further, Hope Lewis, “Introductory Note to Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled”, (2013) 52:6 *International Legal Materials* 1309; Jingyi Li, “Facilitating Access to Digital Content for the Print Disabled: The Need to Expand Exemptions to Copyright Law”, (2015) 27:3 *Intellectual Property Journal* 355; Lida Ayoubi, “The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons”, (2015) 13:2 *New Zealand Journal of Public & International Law* 255; Andrea Wechsler, “WIPO’s Global Copyright Policy Priorities: The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled”, in Herrmann, Krajewski, and Terhechte J. (eds.) *European Yearbook of International Economic Law*, vol. 6 (Springer, 2015); Margaret Ann Wilkinson, “International Copyright: Marrakesh and the Future of Users’ Rights Exceptions”, in Mark Perry (ed.), *Global Governance of Intellectual Property in the 21st Century: Reflecting Policy Through Change* (Springer, 2016) pp.107-127.

the Guiding Principles on Business and Human Rights (hereinafter, Guiding Principles) that, while states bear the primary duty to respect, protect, and fulfil human rights, corporate actors equally have a responsibility to respect human rights.<sup>56</sup> According to the Guiding Principles, the responsibility to respect human rights means that corporate actors “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>57</sup>

In this context, two key responsibilities of book publishing companies in relation to the right to education can be identified. Firstly, book publishing companies have a responsibility to respect the copyright policy space of states. Crucially, while international copyright law (as embodied in the relevant treaties on copyright) does contain minimum standards that states must implement, there is still some policy space left that states can utilise to tailor their national copyright laws to meet their socio-economic needs.<sup>58</sup> In this regard, and as noted above, there are a number of exceptions and limitations to copyright that a state can implement at the national level to facilitate access to learning and teaching materials.

This implies that corporate actors (including book publishing companies) should not engage in lobbying activities to demand for curtailing the scope of existing limitations and exceptions to copyright law or put pressure on states to discourage them from implementing such limitations and exceptions. Such activities, which might ultimately result in impeding students and teachers from gaining access to learning materials, show a disrespect for the right to education.

Secondly, book publishing companies have a responsibility to respect the rights of users seeking to rely on limitations and exceptions to copyright to gain access to learning materials. For instance, where a state has specifically implemented an exception permitting the use of copyright protected works for teaching purposes, a book publishing company would be disrespecting the right to education by using litigation or the threat of litigation to compel

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<sup>56</sup> See, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Human Rights Council, A/HRC/17/31, (21 March, 2011).

<sup>57</sup> *Ibid.*, Principle 11.

<sup>58</sup> See for instance, Art. 8(1) of the TRIPS Agreement which provides that, “Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.”

an educational institution to obtain a licence and pay royalties prior to making use of such works for teaching purposes.

Thus, while laudable, the responsibilities of corporate actors (especially book publishers) in relation to respecting the right to education go beyond merely donating books.<sup>59</sup> Book publishers should also not conflate the corporate responsibility to respect human rights with corporate social responsibility (CSR).<sup>60</sup> The corporate responsibility to respect human rights, unlike corporate social responsibility, has its foundations in international human rights law and (as noted above) it has received the endorsement of the UN Human Rights Council.<sup>61</sup>

<sup>59</sup> See for instance, Harper Collins Publishers, *Corporate Social Responsibility*, (2018) available at < <http://corporate.harpercollins.com/us/corporate-social-responsibility>> (noting that, “HarperCollins supports local communities through volunteer efforts, book donations and support for local charitable organizations through innumerable local activities.”); Penguin Random House, “Social Responsibility,” (2018) available at <<https://www.penguinrandomhouse.com/about-us/social-responsibility/>> (noting that, “Penguin Random House actively supports many local and national organizations around the world that are aligned with its mission to foster a universal passion for reading. Whether it’s through supporting literacy-based organizations, providing volunteers, donating books or creating unique collaborations that benefit readers, we find ways to partner hand-in-hand with communities.”).

<sup>60</sup> For instance, in its “Partner Code of Conduct”, Oxford University Press relegates the right to education to the section on social responsibilities where it notes that: “We *support* universal human rights including equal employment rights, safe workplaces, freedom of speech and of association, and the rights of all to an education.” This can be contrasted with its statement on intellectual property rights (contained in a separate section of the same document) where it states clearly that: “We *protect* OUP’s intellectual property (trademarks, design rights, copyrights, proprietary information, and trade secrets) at all times. We *respect* intellectual property rights throughout the world, including the intellectual property rights of our business partners, and equally we expect our business partners to respect OUP’s intellectual property rights.” (Italics mine). See, Oxford University Press, Partner Code of Conduct, (October 2017), 8-9, available at < [http://fdslive.oup.com/www.oup.com/Group\\_comms/pdf/Partner%20Code%20of%20Conduct/OUP%20Partner%20CoC%20English%202017.pdf](http://fdslive.oup.com/www.oup.com/Group_comms/pdf/Partner%20Code%20of%20Conduct/OUP%20Partner%20CoC%20English%202017.pdf)>

<sup>61</sup> See generally, Christopher Avery, “CSR and Human Rights”, Corporate Citizenship Briefing, (26 September, 2006) available at <<https://ccbriefing.corporate-citizenship.com/2006/09/26/csr-and-human-rights/>> (noting that, “Sometimes the relationship between CSR and human rights is not properly understood. They have very different meanings ... A CSR approach tends to be top-down: a company decides what issues it wishes to address. Perhaps contributing to community education, healthcare or the arts. Or donating to disaster relief abroad. Or taking steps to encourage staff diversity or reduce pollution. These voluntary initiatives should be welcomed. But a human rights approach is different. It is not top-down, but bottom-up – with the individual at the centre, not the corporation. Human rights are based on the inherent dignity of every person; they are those basic rights and freedoms to which all humans are entitled. They have been spelled out in internationally agreed standards, including the Universal Declaration of Human Rights ... When it comes to human rights, companies do not get to pick and choose from a smorgasbord those issues with which they feel comfortable.”)



In essence, a corporate actor fails to respect the right to education when it abuses its copyright such that it impedes the ability of teachers and students to gain access to teaching and learning materials. Importantly, a corporate actor fails to respect the right to education when it uses litigation or threats of litigation to prevent teachers and students from relying on the limitations and exceptions to copyright that a state has incorporated into its national copyright law to facilitate access to teaching and learning materials. As stated in the Guiding Principles, corporate actors should “comply with all applicable laws and respect internationally recognized human rights, wherever they operate.”<sup>62</sup>

Where a corporate actor disrespects the right to education by abusing its copyright, the copyright misuse doctrine can potentially be used to hold it accountable for its actions. As Olson points out, the copyright misuse doctrine “is an equitable defense similar to the common law doctrine of unclean hands. It is based on the notion that courts should deny any relief to a plaintiff if he has come to the court while engaging in improper behaviour himself ... a finding of copyright misuse bars the plaintiff from recovering any damages or injunctive relief for so long as the misuse continues.”<sup>63</sup>

In summary, states bear the primary responsibility to respect, protect and fulfil the right to education. This entails incorporating a right-to-education perspective into the design, revision, interpretation, and enforcement of national copyright laws. Furthermore, states have a duty to facilitate access to learning and teaching materials through the incorporation of limitations and exceptions into their national copyright laws. However, corporate actors equally have a responsibility to respect the right to education. This also means that, where a state has taken steps to incorporate limitations and exceptions into its national copyright law, corporate actors should comply with this national law as this is part of their obligation to respect human rights. The responsibility to respect the right to education also implies that corporate actors (such as book publishing companies) that own copyright should not use their monopoly to prevent teachers and students from relying on such limitations and exceptions to gain access to learning and teaching materials.

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<sup>62</sup> Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Human Rights Council, A/HRC/17/31, (21 March, 2011), Principle 23(a).

<sup>63</sup> David Olson, “First Amendment Based Copyright Misuse”, (2010) 52 *Wm. & Mary L. Rev.* 537, 570. *See also*, John Cross and Peter Yu, “Competition Law and Copyright Misuse”, (2008) 56 *Drake L. Rev.* 427.

A case that demonstrates the need to reframe the responsibility of corporate actors that own copyright as a human rights issue is the Delhi University Photocopy case.<sup>64</sup> This case shows the impact that copyright can have on access to learning and teaching materials. It equally illustrates how the failure of book publishing companies to respect the right to education can impede the enjoyment of this right. This case will be the focus of the analysis in part three below.

## IV. THE DELHI UNIVERSITY PHOTOCOPY CASE

### A. The Trial Court

This dispute was instituted before the Delhi High Court by five book publishing companies (Oxford University Press, Cambridge University Press (UK), Cambridge University Press (India Pvt. Ltd.), Taylor & Francis Group (UK), and Taylor & Francis Books (India Pvt. Ltd.) against both Rameshwari Photocopy Services (operating on the premises of the Delhi University) and Delhi University.<sup>65</sup> The plaintiffs sought a permanent injunction to restrain the defendants from infringing the plaintiffs' copyright through the photocopying of extracts from publications belonging to the plaintiffs and the compilation of these extracts into course packs for sale to students.<sup>66</sup>

The dispute centred on the meaning and scope of Section 52(1)(i) of the Indian Copyright Act which provides that the reproduction of any work "by a teacher or a pupil in the course of instruction" shall not constitute infringement of copyright. While the defendants sought to rely on this provision, the plaintiffs contended that this provision is inapplicable to the case. Importantly, the plaintiffs argued for a narrow interpretation of this provision to confine it to only uses that occur in a classroom and not before or afterwards. The defendants however argued for a broad construction that "would include anything in the process of instruction with the process

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<sup>64</sup> *University of Oxford v. Rameshwari Photocopy Services*, 2016 SCC OnLine Del 5128 : (2016) 68 PTC 386 (Delhi High Court); affirmed in part and remanded with instructions on appeal in *University of Oxford v. Rameshwari Photocopy Services*, 2016 SCC OnLine Del 6229 : (2017) 69 PTC 123.

<sup>65</sup> *University of Oxford v. Rameshwari Photocopy Services*, 2016 SCC OnLine Del 5128 : (2016) 68 PTC 386, para 1. It should be noted that two parties i.e. the Association of Students for Equitable Access to Knowledge (ASEAK) and the Society for Promoting Educational Access and Knowledge (SPEAK) were upon their own request subsequently added as defendants in the case.

<sup>66</sup> *Ibid.*

commencing at a time earlier than the time of instruction, at least for a teacher, and ending at a time later, at least for a student.”<sup>67</sup>

However, from the arguments presented before the trial court, it appears that the main goal of the plaintiffs was to compel the defendants to obtain a licence and prevent them from relying on Section 52(1)(i).<sup>68</sup> This attitude displays a failure to respect the right to education. The plaintiffs’ demand that the defendants obtain a licence prior to the production of course packs would have defeated the objective behind the inclusion of Section 52(1)(i) in the Indian Copyright Act and would have further impeded the access to affordable teaching and learning materials. The defendants however dismissed the plaintiffs’ demand for a licence as unnecessary since the use in contention is already covered by Section 52.<sup>69</sup>

On their own part, the defendants contended, among other things, that as a developing country, very few people can afford the cost of education in India and that Indian students had lower purchasing power when compared with students from other jurisdictions.<sup>70</sup> The defendants grounded their argument for a broad construction of Section 52(1)(i) in the fact that it would be unrealistic to expect the students to buy all the expensive textbooks that contained the different chapters that were prescribed in the university’s syllabus.<sup>71</sup>

The defendants also incorporated a human rights perspective into their argument. According to the defendants, though the dispute involved copyright law, it had to be adjudicated “in the light of the right to access to knowledge.”<sup>72</sup> The defendants, citing Article 26(1) of the Universal Declaration of Human Rights, observed that the right to education is a fundamental right in India and that “access to education is a cherished constitutional value and includes within it access for students to books in [the] library and [the] right to research and to use all materials available.”<sup>73</sup>

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<sup>67</sup> *Ibid.*, para 15 (argument of counsel for SPEAK).

<sup>68</sup> *Ibid.*, para 14 (“...what the plaintiffs are wanting is only a paltry licence fee and on obtaining such licence, the course packs can be made in terms of the said licence.”) See further, *ibid.*, para 20 [“...the objective of this litigation is not to compel the buying of books but to compel the defendant (Delhi University) to enter into a licensing agreement...”].

<sup>69</sup> *Ibid.*, para 15 (argument of counsel for SPEAK characterising the exception in S. 52(1)(i) as a “right”).

<sup>70</sup> *Ibid.*, para 15 (argument of counsel for SPEAK citing Liang (n 17) to support its contention that “the cost of books in proportion to the average income in India was high”).

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*, para 18 (argument of counsel for Delhi University).

<sup>73</sup> *Ibid.*

It should be noted that, initially, the right to education was non-justiciable and only part of the Directive Principles of State Policy under India's Constitution.<sup>74</sup> Subsequently, the Indian Supreme Court interpreted the right to life in Article 21 of the Indian Constitution to include the right to education.<sup>75</sup> In a later decision, the Indian Supreme Court ruled that every citizen has a right to education and the state has a duty to endeavour to provide educational facilities at all levels for the citizens.<sup>76</sup> This approach was however later modified in another decision where the Supreme Court ruled that the right to free education is only available to children until they are 14 years old, thereafter the duty of the state to provide education is subject to the limits of the state's economic capacity.<sup>77</sup> In 2002, via a Constitutional Amendment, the right to education was incorporated into the Indian Constitution as a fundamental right albeit confined to the free education of children aged between six and fourteen years.<sup>78</sup> Thus, since the right to education is a fundamental right in India, the state has an obligation to incorporate a human rights perspective into the design and interpretation of its national copyright law.

In its decision, the trial court agreed with the defendants that the question of obtaining a licence would only arise if the defendants' activities are not covered by Section 52 of the Copyright Act.<sup>79</sup> In holding that the actions of the defendants did not amount to copyright infringement, the court adopted a broad interpretation of Section 52(1)(i). According to the trial court,

“...the words ‘in the course of instruction’ within the meaning of Section 52(1)(i) ... 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 and that imparting and receiving of instruction is not limited to [the] 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 ... that the pupil stands instructed in what he/she has approached the teacher to learn. Similarly the words ‘in the course of instruction’ ... have to

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<sup>74</sup> Liang, (n 17), 199.

<sup>75</sup> See, *Francis Coralie Mullin v. UT of Delhi*, (1981) 1 SCC 608 : AIR 1981 SC 746.

<sup>76</sup> *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666.

<sup>77</sup> *Unni Krishnan, J.P. v. State of A.P.*, (1993) 1 SCC 645.

<sup>78</sup> See, Art. 21-A of the Indian Constitution which provides that, “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.”

<sup>79</sup> *University of Oxford v. Rameshwari Photocopy Services*, 2016 SCC OnLine Del 5128 : (2016) 68 PTC 386, para 23.

include within their ambit the prescription of syllabus the preparation of which both the teacher and the pupil are required to do before the lecture and the studies which the pupils are to do post lecture...”<sup>80</sup>

Notably, in its decision, the trial court adopted a socio-centric view of copyright as it held that copyright is not a natural right that confers absolute ownership but “is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.”<sup>81</sup> The trial court was also mindful of the need to facilitate access to learning materials. It agreed with the defendants that the students cannot be expected to buy all the prescribed books and thus they cannot be seen as potential customers of the plaintiffs.<sup>82</sup>

### B. The Division Bench

The plaintiffs subsequently filed an appeal before the Division Bench of the Delhi High Court.<sup>83</sup> At this stage, apart from the arguments already canvassed by both parties before the trial court which were equally repeated before the Division Bench, one of the key points of disagreement between the parties was whether Section 52(1)(i) gives teachers and students an absolute right to make copies of works or whether it is subject to a ‘fairness’ requirement.<sup>84</sup> The plaintiffs (now appellants) contended that a ‘fair use’ requirement should be read into Section 52(1)(i) and that the preparation of course packs pursuant to this provision would not be a ‘fair use.’<sup>85</sup>

In its decision, while no explicit reference was made to the right to education, the Division Bench still nevertheless acknowledged the importance of education. According to the court, “education is the foundation on which a progressive and prosperous society can be built.”<sup>86</sup> The court equally emphasized the need to promote “equitable access to knowledge to all segments of the society, irrespective of their caste, creed and financial position” and it noted that “the more indigent the learner, the greater the responsibility to ensure equitable access.”<sup>87</sup> Thus, the court implicitly acknowledged that the state has a duty to facilitate access to learning materials, especially for indigent students.

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<sup>80</sup> *Ibid.*, para 72.

<sup>81</sup> *Ibid.*, para 80.

<sup>82</sup> *Ibid.*, para 87.

<sup>83</sup> *University of Oxford v. Rameshwari Photocopy Services*, 2016 SCC OnLine Del 6229 : (2017) 69 PTC 123.

<sup>84</sup> *Ibid.*, para 17.

<sup>85</sup> *Ibid.*, para 27.

<sup>86</sup> *Ibid.*, para 30.

<sup>87</sup> *Ibid.*

In relation to the appellants' contention that a fairness requirement should be read into Section 52(1)(i), the court noted that "there has to be fairness in every action."<sup>88</sup> While acknowledging that Section 52(1)(i) is not explicitly subject to a fairness requirement, it noted that "unless the legislative intent expressly excludes fair use, and especially when [the] results of [a person]'s labour is being utilized by somebody else, fair use must be read into the statute."<sup>89</sup> The court therefore held that the general principle of 'fair use' should be read into Section 52(1)(i).<sup>90</sup> However, the court clarified that, by incorporating 'fair use' into this provision, it was not adopting the American approach to fair use as contained in Section 107 of the US Copyright Act.<sup>91</sup>

Moreover, the court ruled that 'fair use' with regard to Section 52(1)(i) should be determined by the purpose of the use.<sup>92</sup> According to the court:

"In the context of teaching and use of copyrighted material, the fairness in the use can be determined on the touchstone of 'extent justified by the purpose'. In other words, utilization of the copyrighted work would be a fair use to the extent justified for the purpose of education. It would have no concern with the extent of material used, both qualitative or quantitative ... so much of the copyrighted work can be fairly used which is necessary to effectuate the purpose of the use i.e. make the learner understand what is intended to be understood."<sup>93</sup>

The court's approach in this regard is consistent with the incorporation of a right-to-education perspective into the interpretation of copyright law. This approach is in accordance with the obligation of the state to respect the right to education as it will ensure that teachers and students can make copies of works without any restrictions as to quality or quantity as long as it is for an educational purpose.

The court also agreed with the broad interpretation given to the phrase 'in the course of instruction' by the trial court.<sup>94</sup> It however remanded the case back to the trial court with instructions to determine whether the materials included in the course packs produced by the defendants were justified for educational purposes i.e., for instructional use by teachers.<sup>95</sup> It also asked

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<sup>88</sup> *Ibid.*, para 31.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, para 32.

<sup>93</sup> *Ibid.*, para 33.

<sup>94</sup> *Ibid.*, para 50.

<sup>95</sup> *Ibid.*, para 56.

the trial court to determine whether photocopying of entire books would be permissible.<sup>96</sup>

However, given the reasoning of the court in its interpretation of Section 52(1)(i), it could be argued that the issues which the Division Bench requested the trial court to consider had already become moot. One can only imagine that it would not have been too difficult for the defendants to establish that the materials included in the course packs were justified for educational purposes. Furthermore, as the Division Bench had already ruled that copyright protected works can be used without any qualitative or quantitative restrictions as long as it is necessary for educational purposes, it is unclear why it was thought necessary to still request that the trial court should determine whether the photocopying of entire books would be a permissible activity.

Perhaps, reading the handwriting on the wall, it is not surprising that a few months after the decision of the Division Bench, the appellants announced that they were withdrawing the suit and they were not going to appeal to the Indian Supreme Court.<sup>97</sup> While some of the arguments canvassed by the appellants before the courts in this case indicate a disrespectful attitude towards the right to education, in their joint statement, the appellants note that they “support and seek to enable equitable access to knowledge for students.”<sup>98</sup> They also claim to “understand and endorse the important role that course packs play in the education of students.”<sup>99</sup> If these statements by the appellants are a reflection of a change of attitude on their part, they provide an illustration of what one would expect from corporate actors that intend to respect the right to education.

### C. Section 52(1)(i) and International Copyright Law

A final question that needs to be addressed is whether Section 52(1)(i) and its interpretation by the Indian courts in this case is consistent with India's obligations under international copyright law. This is important because, while Section 52(1)(i) and its interpretation by the Indian courts is obviously compatible with India's obligation under international human rights law, some might contend that it is in conflict with India's obligation under international copyright law. In this regard, the most relevant provisions are

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<sup>96</sup> *Ibid.*, para 79.

<sup>97</sup> See, Joint Statement by Oxford University Press, Cambridge University Press and Taylor & Francis, (9 March, 2017) available at <<http://fdslive.oup.com/asiaed/News%20Items%20and%20Images/Joint%20Public%20Statement.pdf>>

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

Articles 9(2) and 10(2) of the Berne Convention and Article 13 of the TRIPS Agreement.

Importantly, Article 10(2) of the Berne Convention gives countries the freedom to permit the use of literary and artistic works by way of illustration in publications, or sound or visual recordings for teaching purposes.<sup>100</sup> It is however subject to two requirements. The use must be “to the extent justified by the purpose” and it must be “compatible with fair practice.” As there are no quantitative restrictions in Article 10(2) of the Berne Convention,<sup>101</sup> it arguably provides a basis for countries to introduce exceptions into their copyright laws to permit the reproduction of textbooks and other learning materials in various forms including course packs. The extent of the reproduction should however be justified by the purpose of teaching and it must be compatible with fair practice. The Berne Convention however does not define “fair practice” and it is up to states to determine what constitutes “fair practice.”<sup>102</sup>

Article 9(2) of the Berne Convention equally permits countries to introduce exceptions to the right of reproduction. However, such exceptions should be in certain special cases, should not conflict with a normal exploitation of the work, and should not unreasonably prejudice the legitimate interests of the author. These three requirements have subsequently become known as

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<sup>100</sup> Art. 10(2) of the Berne Convention provides that, “It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.”

<sup>101</sup> See, Sam Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, SCCR/9/7, Standing Committee on Copyright and Related Rights, Ninth Session, (2003), 14.

<sup>102</sup> It should be noted that the expression “fair practice” also appears in Article 10(1) of the Berne Convention which deals with quotations. Writing in relation to the meaning of “fair practice” in the context of Art. 10(1) of the Berne Convention, Ricketson initially suggests that it “will be a matter for national tribunals to determine in each particular instance” but he also goes on to suggest that the criteria in Art. 9(2) of the Berne Convention (which deals with the three step test) “would appear to be equally applicable here in determining whether a particular quotation is ‘fair,’ namely whether it conflicts with a normal exploitation of the work and unreasonably prejudices the legitimate interests of the author.” See, Ricketson, (n 101), 13. Aplin and Bently however reject the view that the meaning of “fair practice” should be left to countries or that it should be synonymous with the three-step test. According to them, fair practice “has an autonomous and pluralistic meaning that embraces notions of moral and economic harm, distributive justice concerns, freedom of expression principles, and, in limited circumstances, custom.” See, Tanya Aplin and Lionel Bently, “Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use”, in Wee Loon Ng, Haochen Sun, and Shyam Balganeshe (eds.), *Comparative Aspects of Limitations and Exceptions in Copyright Law*, (Cambridge University Press, 2018) [Forthcoming], 10-11, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3119056](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119056)>.



the three-step test. It should however be noted that the teaching exception contained in Article 10(2) of the Berne Convention is distinct from and not subject to the three-step test in Article 9(2) of the Berne Convention.<sup>103</sup>

Both Articles 9(2) and 10(2) of the Berne Convention were incorporated into the TRIPS Agreement via Article 9(1) of the TRIPS Agreement which requires members to comply with both provisions. However, the TRIPS Agreement also contains its own version of the three-step test in the context of copyright. Article 13 of the TRIPS Agreement requires states to “confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” Thus, the TRIPS Agreement appears to have expanded the scope of the three-step test. Under the TRIPS Agreement, the test is no longer confined to just the right of reproduction (as contained in Article 9(2) of the Berne Convention), the test now applies to all types of exclusive rights. Furthermore, ‘author’ in Article 9(2) of the Berne Convention has been replaced with ‘right holder’ in Article 13 of the TRIPS Agreement.

This development has raised the question as to whether Article 10(2) of the Berne Convention is now subject to the three-step test in Article 13 of the TRIPS Agreement. This question is important because of the uncertainty surrounding the meaning and application of the three-step test.<sup>104</sup> If Article 10(2) of the Berne Convention is not subject to Article 13 of the TRIPS Agreement, then countries need not worry about the three-step test when trying to introduce the teaching exception. There is however a divergence of opinion on whether or not Article 13 of the TRIPS Agreement applies to Article 10(2) of the Berne Convention.

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<sup>103</sup> As noted in the Records of the Stockholm Conference of 1967 where Art. 9(2) of the Berne Convention was introduced, “The Drafting Committee was unanimous in adopting, in the drafting of new texts as well as in the revision of the wording of certain provisions, the principle *lex specialis legi generali derogat*: special texts are applicable, in their restricted domain, exclusive of texts that are universal in scope. For instance, it was considered superfluous to insert in Art. 9, dealing with some general exceptions affecting authors’ rights, express references to Arts. 10, 10bis, 11bis and 13 establishing special exceptions.” See, WIPO, *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967*, vol. II, (Geneva, 1971), 1134.

<sup>104</sup> See, Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, “Copyright Policy and the Right to Science and Culture”, A/HRC/28/57, (24 December, 2014), para 75 (noting in relation to the three-step test that, “considerable disagreement and uncertainty remains about how to interpret and apply the standard, leaving many countries hesitant to innovate.”); See also, Lawrence R. Helfer, “World Music on a US Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act”, (2000) 80 B.U. L. Rev. 93, 147 (noting that, “The proper construction of article 13’s ‘three-step’ test is among the most uncertain and contested issues in international copyright law.”).

On the surface, Article 13 of the TRIPS Agreement seems to apply to all limitations and exceptions including those contained in the Berne Convention and this is the view of some scholars.<sup>105</sup> In addition, in *United States - Section 110(5) of the US Copyright Act*, a World Trade Organization (WTO) dispute settlement panel took the view that Article 13 of the TRIPS Agreement is not confined to the exclusive rights newly introduced via the TRIPS Agreement.<sup>106</sup> If this first view is correct, it implies that any exception introduced by a country on the basis of Article 10(2) of the Berne Convention must also comply with the three step test in Article 13 of the TRIPS Agreement.

A second view is that Article 10(2) of the Berne Convention is already compatible with the three-step test. According to Ricketson, “the references to being ‘compatible with fair practice’ may correspond to the second and third steps of the three-step test, while the limited scope of [Article 10(2)] undoubtedly brings [it] within the first step” and therefore the requirement of Article 10(2) of the Berne Convention overlaps with Article 13 of the TRIPS Agreement and there is no conflict.<sup>107</sup> The obvious danger with this approach is that it exposes some of the exceptions that are expressly not subject to the three-step test under the Berne Convention to the vagaries and unpredictability of the application of the three-step test. Thus, a country might find its teaching exception enacted pursuant to Article 10(2) of the Berne Convention being successfully challenged before a WTO dispute settlement panel.

A third view, and one which this paper agrees with, is that Article 13 of the TRIPS Agreement does not apply to Article 10(2) of the Berne Convention. According to Okediji, “given the structure of the Berne Convention, the

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<sup>105</sup> See, for instance, Ricketson, (n 101), 47 (noting that, “as Art. 9(1) of TRIPS requires members to comply with Arts. 1 to 21 of Berne (other than Art. 6bis), the better view must be that Art. 13 applies to all the exclusive rights listed in Berne, including that of reproduction”).

<sup>106</sup> World Trade Organization, *United States - Section 110(5) of the US Copyright Act*, WT/DS160/R (15 June, 2000), para 6.80. However, since the relationship between Art. 10(2) of the Berne Convention and Art. 13 of the TRIPS Agreement was not the focal point of the panel’s decision, the question remains open. See, Aplin and Bently, (n 102), 13; Jo Oliver, “Copyright in the WTO: The Panel Decision on the Three-Step Test”, (2001) 25 Colum. J.L. & Arts. 119, 147.

<sup>107</sup> Ricketson, (n 101), 52. See also, WIPO, *The Implications of the TRIPS Agreement on Treaties Administered by WIPO*, WIPO publication No. 464(E), (1996), paras 22-23 (noting in relation to Art. 13 of the TRIPS Agreement that, “None of the limitations and exceptions permitted by the Berne Convention should, if correctly applied, conflict with the normal exploitation of the work and none of them should, if correctly applied, prejudice unreasonably the legitimate interests of the right holder. Thus, generally and normally, there is no conflict between the Berne Convention and the TRIPS Agreement as far as exceptions and limitations to the exclusive rights are concerned.”).

three-step test does not extend to a state exercise of discretion pursuant to those Articles where such discretion has explicitly been granted, such as [Article 10(2)]. Thus, states may freely enact legislation with respect to [Article 10(2)] without the restrictions of the three-step test.”<sup>108</sup> In the same vein, Liang invokes the *lex specialis* principle to contend that, as a specific provision that deals with teaching and education, Article 10(2) of the Berne Convention should not be subject to the more general provision contained in Article 13 of the TRIPS Agreement.<sup>109</sup> A country that adopts this approach can, pursuant to Article 10(2) of the Berne Convention, introduce a teaching exception into its national copyright law without worrying about the three-step test.

The Indian courts also had to grapple with this question in the Delhi University Photocopy case. At the trial court, in determining whether Section 52(1)(i) of the Indian Copyright Act is compatible with India’s obligations under international copyright law, there was a conflation of Articles 9(2) and 10(2) of the Berne Convention and Article 13 of the TRIPS Agreement. According to the trial court,

“...under the Berne Convention ... the only binding obligation on the ... countries is to in their respective legislations (i) not permit the reproduction of the work so as to conflict with a normal exploitation of the work and so as to unreasonably prejudice the legitimate interest of the author; and, (ii) to while permitting utilization of the literary works including in publications for teaching ensure that such utilization is to the extent justified by the purpose and compatible with fair practice. Similarly, under the TRIPS Agreement also the member countries have agreed to confine the exceptions to the copyright to the extent they do not unreasonably prejudice the legitimate interest of the right holder.”<sup>110</sup>

Thus, the trial court did not consider each of these provisions separately. The trial court further held that “India, under the international covenants ... has the freedom to legislate as to what extent utilisation of copyrighted

<sup>108</sup> See, Ruth Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*, UNCTAD-ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 15, (March 2006), 14. See also, Gwen Hinze, *Making Knowledge Accessible Across Borders: The Case for Mandatory Minimum International Copyright Exceptions and Limitations for Education, Capacity Building and Development*, Electronic Frontier Foundation, (October 2008), 3, available at <<https://files.eric.ed.gov/fulltext/ED509860.pdf>>

<sup>109</sup> Liang, (n 17), 220.

<sup>110</sup> *University of Oxford v. Rameshwari Photocopy Services*, 2016 SCC OnLine Del 5128 : (2016) 68 PTC 386, para 95.

works for teaching purpose is permitted but agreed to ensure that the same is to the extent ‘justified by the purpose’ and does not ‘unreasonably prejudice the legitimate rights of the author.’”<sup>111</sup> The trial court took the view that Indian legislators had the provisions of both the Berne Convention and the TRIPS Agreement in mind when they enacted Section 52(1)(i) and it was not willing to interfere with the decision of the legislators in this regard.<sup>112</sup>

On appeal, the Division Bench did not fare any better in this regard. According to the Division Bench,

“Nothing much turns on Article 13 of the TRIPS Agreement and Article 9 of the Berne Convention for the reason that the contents thereof are merely directory and have enough leeway for the signatory countries to enact the copyright law in their municipal jurisdiction concerning use of copyrighted works for purposes of dissemination of knowledge.”<sup>113</sup>

It appears that the Division Bench simply assumed that Section 52(1)(i) is compatible with the three-step test. It is however doubtful if the making of course packs through the reproduction of multiple copies of copyright protected works without obtaining a licence from the copyright owner would withstand a challenge before a WTO dispute settlement panel. It is not implausible or unreasonable to predict that a WTO panel might hold that the production of course packs unreasonably prejudices the legitimate interests of a copyright owner. It is suggested here that Article 10(2) of the Berne Convention provides a stronger normative basis for both the trial court’s and the Division Bench’s interpretation and application of Section 52(1)(i) of the Indian Copyright Act. If one takes the view that Article 10(2) of the Berne Convention is not subject to the three-step test, then arguably Section 52(1)(i) and the decision of the Indian courts in the Delhi University Photocopy case is compatible with international copyright law.

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<sup>111</sup> *Ibid.*, para 96.

<sup>112</sup> *Ibid.*, para 97 (noting that, “It is not for this Court to impose its own wisdom as to what is justified or what is unreasonable, to expand or restrict what the legislators have deemed fit. The legislature is not found to have imposed any limitation on the extent of reproduction. Once the legislature ... take a call on what is justified for the purpose of teaching and what will unreasonably prejudice the legitimate interest of the author [and] has not imposed any such limitation, this Court cannot impose the same.”).

<sup>113</sup> *University of Oxford v. Rameshwari Photocopy Services*, 2016 SCC OnLine Del 6229 : (2017) 69 PTC 123, para 63.

## V. CONCLUSION

Since states bear the primary responsibility with regard to the right to education, states should ensure that they incorporate a right-to-education perspective into the design, interpretation, and enforcement of their national copyright laws. However, corporate actors also have a responsibility to respect human rights including the right to education. Thus, companies that own copyright in learning materials (such as book publishers) equally have a responsibility to respect measures that states have introduced into their national copyright laws to facilitate access to learning materials. Furthermore, corporate actors that own copyright in learning materials should not use litigation or the threat of litigation to try to prevent teachers and students from relying on limitations and exceptions to copyright to gain access to learning materials.