

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 16th September, 2016.**

+ **CS(OS) 2439/2012, I.As. No. 14632/2012 (of the plaintiffs u/O 39 R-1&2 CPC), 430/2013 (of D-2 u/O 39 R-4 CPC) & 3455/2013 (of D-3 u/O 39 R-4 CPC)**

THE CHANCELLOR, MASTERS & SCHOLARS OF THE UNIVERSITY OF OXFORD & ORS. Plaintiffs

Through: Mr. Saikrishna Rajagopal with Mr. Sahil Sethi, Advs.

Versus

RAMESHWARI PHOTOCOPY SERVICES & ANR.Defendants

Through: Mr. Rajesh Yadav and Mr. Saurabh Seth, Advs. for D-1.
Mr. Gopal Subramaniam, Sr. Adv. with Mr. Saurabh Banerjee, Adv. for D-2.
Mr. Rajat Kumar, Adv for D-3.
Mr. N.K. Kaul, Sr. Adv. with Ms. Swathi Sukumar and Ms. Anu Paarcha, Advs. for D-4.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The five plaintiffs, namely i) Oxford University Press, ii) Cambridge University Press, United Kingdom (UK), iii) Cambridge University Press India Pvt. Ltd., iv) Taylor & Francis Group, U.K. and, v) Taylor & Francis Books India Pvt. Ltd., being the publishers, including of textbooks,

instituted this suit for the relief of permanent injunction restraining the two defendants namely Rameshwari Photocopy Service (carrying on business from Delhi School of Economic (DSE), University of Delhi) and the University of Delhi from infringing the copyright of the plaintiffs in their publications by photocopying, reproduction and distribution of copies of plaintiffs' publications on a large scale and circulating the same and by sale of unauthorised compilations of substantial extracts from the plaintiffs' publications by compiling them into course packs / anthologies for sale.

2. The plaintiffs, in the plaint, have given particulars of at least four course packs being so sold containing photocopies of portions of plaintiffs' publication varying from 6 to 65 pages. It is further the case of the plaintiffs that the said course packs sold by the defendant No.1 are based on syllabi issued by the defendant No.2 University for its students and that the faculty teaching at the defendant No.2 University is directly encouraging and recommending the students to purchase these course packs instead of legitimate copies of plaintiffs' publications. It is yet further the case of the plaintiffs that the libraries of the defendant No.2 University are issuing books published by the plaintiffs stocked in the said libraries to the defendant No.1 for photocopying to prepare the said course packs.

3. The suit along with IA No.14632/2012 under Order XXXIX Rules 1 & 2 of Code of Civil Procedure, 1908 (CPC) for interim relief restraining photocopying/reproducing copies of plaintiffs' publication and sale of course packs came up before this Court first on 14th August, 2012 when summons of the suit and notice of the application for interim relief were issued and though no *ex-parte* ad-interim relief granted but a Commissioner appointed to visit the premises of the defendant No.1 without prior notice and to make an inventory of all the infringing and pirated copies of the plaintiffs' publication found and to seize and seal the same.

4. The defendant No.1 has filed a written statement defending the suit *inter alia* (a) disputing the copyright of the plaintiffs and contending that the plaintiffs have not produced any document to establish their copyright; (b) denying any act of infringement of copyright and alternatively pleading that the activities carried on by it amount to fair use of the works within the meaning of Sections 52(1)(a) & (h) of the Copyright Act, 1957, and pleading (c) that it has been granted licence with respect to a small shop within the campus of DSE to provide photocopy services to students and faculty at nominal rate and as per the terms of licence, the defendant No.1 is required to provide 3000 photocopies per month to DSE, an institute of the

University of Delhi, free of cost and to charge only the prescribed rate for the photocopy service meted out to others; (d) that the defendant No.2 University recommends the syllabi for each academic year along with suggested reading materials of a wide variety of authors and which material is contained in different books of different publishers sold at a high price, often beyond the reach of the students; (e) that the syllabi of the defendant No.2 University does not recommend the entire publication but only certain extracts from the same; (f) that the students would be reluctant to buy the entire publication just for reading a particular chapter/extract therein and cannot afford to buy 35 to 40 books, portions of which are prescribed in the syllabi and / or suggested for reading; (g) that to ease the financial burden on students, majority of the titles prescribed in the syllabi are housed in the library of the defendant No.2 University which provides such expensive books for reference of students; (h) however owing to only limited copies of such books being available with the library, not enough to cater to the needs of all the students, the library allows the students to obtain copies of such books for their own reference and study; (i) that the services of the defendant No.1 are availed by the students and faculty to photocopy the relevant extracts from the books, articles and journals at the nominal / prescribed rate

for use for educational purpose and reference only; (j) that in view of the limited number of original books stored in the library, the faculty of DSE has compiled various master copies of books, articles and journals, which are then used for photocopying by the defendant No.1 in order to save the original work from being damaged; (k) that such course packs are used by teachers and students in the course of academic instructions and for research purposes; (l) that in fact the Licence Deed executed between the defendant No.2 University and the defendant No.1 expressly provides that master copy of each article or chapter of a book for reading is to be provided by the department concerned, so that the master copy could be given for xeroxing, saving the original document; (m) that the defendant No.1 is xeroxing the master copy at the instructions of and on the terms imposed by the defendant No.2 University; (n) that the defendant No.1 is not commercially exploiting the author's copyright but is giving copies to students at nominal rates of 40 paise per page to aid their education; (o) that even if the students were to bring the original work to get the same photocopied, the defendant No.1 would charge the same rate; (p) that the defendant No.1 has acted in good faith within the meaning of Section 76 of the Copyright Act.

5. The defendant No.2 University has also contested the suit by filing a written statement in which, besides the pleas in the written statement of the defendant No.1, it is further pleaded (i) that world over Universities permit students to copy limited pages from any work for use in research and for use in the classroom by a student or teacher and this is recognised by Sections 52(1)(a) & (i) of the Copyright Act also; (ii) that individual teacher and student may either read books prescribed in the syllabus and curriculum offered by the defendant No.2 University in the library or borrow the books and make photocopy of the relevant chapter and pages; this service of copying certain pages for educational purpose is necessary because purchasing individual books is expensive and several of the books are also out of print or not available in India; (iii) that the facility of photocopying limited portions of books for educational and research purposes could have been provided within the library if the University had adequate space, resources and manpower at its disposal; (iv) instead the defendant No.2 University has granted the facility of photocopying to defendant No.1 keeping the interest of the students in mind; (v) that Copyright Act is a piece of welfare Legislation and the rights of authors and owners are to be balanced with the competing interest of the society; (vi) that the defendant

No.2 University is an instrumentality and / or agency of the state imparting education to achieve the constitutional goals; (vii) that the plaintiffs have not shown assignments made by authors and owners of copyright in favour of the plaintiffs; (viii) that the suit is also barred by Section 52(1)(zb) excluding from the purview of infringement any reproduction, adaptation, issuance of copies to facilitate persons with disabilities to access such works for educational purposes; (ix) that the only nexus of the defendant No.2 University with the defendant No.1 is of the University having permitted the defendant No.1 to carry on photocopy operations from its premises; else, the defendant No.2 University is nowhere photocopying for its own purpose nor does anyone to whom books are issued by the library of the defendant No.2 University disclose the purpose of taking the said books; (x) that the defendant No.2 University has never issued books to the defendant No.1 for reproduction; (xi) that the defendant No.2 is not gaining anything out of such reproduction; (xii) that the defendant No.2 University is in the process of forming a Committee of Heads of all the constituent departments of DSE with the mandate to explore the ways and means to ensure access to educational material keeping in mind the interest of the students, including of providing E-Books, online digital holdings, supporting open service

editions and such other measures as may be available to ensure wider access of educational material for providing knowledge and information.

6. The Commissioner appointed by this Court reported (I) that the shop of the defendant No.1 was having five photocopying machines and one spiral binding machine; (II) photocopy of one of the books published by the plaintiff Cambridge University Press in the form of loose sheets was found besides the photocopy machine; (III) as many as 45 course packs containing photocopied articles comprising of 1 to 22 copies of varying number of pages of the books of the plaintiffs were found; (IV) 8 books were found being photocopied cover to cover.

7. Vide order dated 26th September, 2012, the defendant No.2 University was directed to examine the proposal of the counsel for the plaintiffs that the defendant No.2 University obtains a licence from Reprographic Rights Organisation for preparing course packs and to also inform this Court whether any proposal for obtaining such licence was pending consideration. Vide the same order, the defendant No.1 was also directed to maintain proper accounts of sales and to file a fortnightly statement before this Court.

8. Vide order dated 17th October, 2012, taking into consideration plea in the written statement of the defendant No.2 University of having not sanctioned photocopying by the defendant No.1 of the books and recording the statement of the counsel for the defendant No.2 University that whatever had happened was under a *bona fide* impression, the defendant No.1 was restrained from making, selling course packs / re-producing the plaintiffs' publications or substantial portions thereof by compiling the same either in a book form or in a course pack, till the final disposal of the application for interim relief.

9. The defendant No.2 University preferred FAO(OS) No.567/2012 against the aforesaid ad-interim order dated 17th October, 2012 but which was on 27th November, 2012 dismissed as withdrawn with liberty to the defendant No.2 University to file an application clarifying its stand.

10. IA No.430/2013 has been filed by the defendant No.2 University under Order XXXIX Rule 4 of the CPC.

11. Association of Students for Equitable Access to Knowledge (ASEAK) filed IA No.3454/2013 for impleadment in the present suit and which was allowed vide order dated 1st March, 2013 and ASEAK impleaded as

defendant No.3. Though FAO(OS) No.192/2013 was preferred by the plaintiffs thereagainst but dismissed vide order dated 12th April, 2013 with some clarification. The defendant No.3 has also filed IA No.3455/2013 under Order XXXIX Rule 4 of the CPC.

12. Society for Promoting Educational Access and Knowledge (SPEAK) filed IA No.5960/2013 for impleadment and which was also allowed on 12th April, 2013 and SPEAK impleaded as defendant No.4.

13. The hearing of the applications under Order XXXIX Rules 1 & 2 of the CPC and Order XXXIX Rule 4 CPC commenced on 25th April, 2013 and concluded on 21st November, 2014, when judgment was reserved. However, need to re-list the matter for hearing is not felt as copious notes were taken at the time of hearing and written arguments have also been filed and perused and the same keep the matter fresh.

14. It is the contention of the counsel for the plaintiffs (a) that the defendant No.2 University has institutionalised infringement by prescribing chapters from the publications of the plaintiffs as part of its curriculum / syllabus and permitting photocopy of the said chapters and sale thereof as course packs; (b) however the defendant No.2 University in its written

statement has dis-associated itself from the said activity; (c) that inspite thereof, the licence of the defendant No.1 had been renewed; (d) that the objective of the plaintiffs is not to stop the students from photocopying but to stop the systematic photocopying of their publications; (e) that the course packs being so sold by the defendant No.1 with the permission of the defendant No.2 University contain no additional material except photocopies from the publications of the plaintiffs; (f) that the profit motive is evident from the rate of 40 / 50 paise per page, instead of the prevalent market rate of 20 / 25 paise per page being charged; (g) that the defence pleaded of Sections 52(1)(i) is not applicable as the reproduction of the works of the plaintiffs is not by a teacher or pupil and not in the course of instruction; (h) that on the contrary, the defendants, by selling photocopies of chapters from the books of the plaintiffs in the form of compilation, are competing with the plaintiffs; (i) attention was invited to the meaning of the word 'publication' in Section 3 of the Act; (j) attention was invited to Section 52(1)(i) as it stood prior to the amendment with effect from 21st June, 2012 and it was argued that if such reproduction of copyrighted works as is being carried out by the defendants are to be covered by Section 52(1)(i) as it stands post amendment, there would have been no need for Section 52(1)(h); (k) that the

amendment with effect from 21st June, 2012 of Section 52 was in accordance with the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and Agreement on Trade-Related Aspect of Intellectual Property Rights (TRIPS Agreement) and copies of which were handed over and attention invited to Articles 9 & 10 of Berne Convention and Article 13 of TRIPS Agreement; (l) reference was made to the legislative debates in the United Kingdom (U.K.) and it was argued that Sections 52(1)(h) & (i) have to be interpreted in the light thereof; (m) that list of members of the Indian Reprographic Rights Organization (IRRO), list of Reprographic Organizations with whom IRRO has signed treaties and the licencing modes of IRRO and its Tariff scheme were handed over and it was informed that if the defendant No.2 University were to take an IRRO licence, the cost to the students would not be much more than is being already paid to the defendant No.1; (n) that the publishers invest in publishing the books and if the copyright of the publishers is not protected, it will sound a death knell for the publication business; (o) that on further enquiry it was informed that the cost per college would be Rs.12,000/- per year, if an IRRO licence were to be taken; (p) that 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; (q) that the IRRO licences would be subject to scrutiny of the Copyright Board under Section 33A of the Act; (r) that unless the rights of the plaintiffs are protected, educational publications would become an unfeasible business; on further enquiry as to the licence fee that would be required to be paid if an IRRO licence were to be taken, attention was drawn to Rule 57(5) of the Copyright Rules, 2013; (s) that the actions of the defendants are clearly in the teeth of Section 14(a)(i) & (ii) of the Copyright Act and constitute infringement; (t) that Section 52 is akin to the law in U.K. and unlike Section 107 of the United States (US) Laws defining 'fair use' only briefly; (u) that India is bound by the Berne Convention for the Protection of Literary and Artistic Works and TRIPS Agreement, unless Section 52 is found to be providing to the contrary; (v) reliance was placed on *Entertainment Network (India) Ltd. Vs. Super Cassette Industries Ltd.* (2008) 13 SCC 30 holding that to construe Section 31(1)(b) of the Act, regard to the International Covenants and the laws operating in other countries is necessary; (w) reference was made to *Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey* (1984) 2 SCC 534 holding that municipal law must respect rules of international law and that the comity of nations requires that rules of international law may be accommodated in the

municipal law, even without express legislative sanction provided that they do not run into conflict with other Acts of Parliament; (x) reliance was placed on “Collective Management of Copyright and Related Rights” edited by Professor Daniel Gervais referring to the “three steps test” to judge the copyright status of private copying, adopted for the first time by the 1967 Stockholm Diplomatic Conference to revise the Berne Convention and included in Article 9(2) of the Convention; (y) that the defendants on the one hand are infringing copyright of the plaintiffs and on the other hand also depriving the plaintiffs of the IRRO licence fee; (z) that once an efficient mechanism is in place to deal with the situation as has arisen, the same should be adopted; (za) that the only market of textbooks is in the field of education and if it were to be held that textbooks can be copied in the field of education, the publishers would not be able to sell the books and be ultimately compelled to shut down the business of publication and sale of text books; (zb) that Section 52(1)(g) prior to the amendment, and equivalent to Section 52(1)(h) post amendment, used the words “intended for the use of educational institutions” and which words were dropped and substituted by the words “intended for instructional use”; (zc) that to matters of copying as is being done, Section 52(1)(i) is not applicable and only Section 52(1)(h) is

applicable and the copying has to be within the confines thereof; (zd) though in the draft Amendment Act, the words used were “copyright in a literary, dramatic, musical or artistic work is not infringed by its copying in the course of preparation for instruction....” but the words “in the course of preparation for instruction” were dropped in the final amendment act and which is again indicative that the applicability of Section 52(1)(i) is confined to reproduction “in the course of instruction” and not “in the course of preparation for instruction”; (ze) that it matters not whether the author or the publisher intended the book to be for instructional use—Section 52(1)(h) uses the words “published literary or dramatic works” irrespective of whether they were published for instructional use or not; (zf) that there is a difference in the meaning of the words “in the course of instruction” used in Section 52(1)(i) and “for the purpose of instruction”; (zg) that the copying and reproduction being done by the defendants is not “in the course of instruction” but “for the purpose of instruction”; (zh) that if Section 52(1)(i) were to be read as allowing the teacher to make copies for the purposes of instruction, there would have been no need for Section 52(1)(h); (zi) reliance was placed on *Princeton University Press Vs. Michigan Document Services Inc.* 99 F.3d 1381 (6th Cir. 1996) also concerned with an action for

restraining the defendant from reproducing substantial segments of copyrighted works of scholarship, binding the copies into course packs and selling the course packs to the students for use in fulfillment of reading assignments given by professors at University of Michigan and negating the defence of fair use doctrine; it was held that the fair use of copyright work does not provide blanket immunity for multiple copies for classroom use; (zj) that if such copying is allowed, there would be no market left for the book(s); (zk) that the situation here is different from the judgment of the Supreme Court of Canada in *Province of Alberta vs. Canadian Copyright Licensing Agency* 2012 SCC 37 where the teacher was making short passages from the books; here pages after pages have been photocopied; (zl) attention was also invited to *Basic Books Inc. Vs. Kinko's Graphics Corporation* 758 F. Supp. 1522 also holding that copying of excerpts without permission, compiling them into course pack and selling them to college students amounted to infringement; (zm) that the defendant No.2 University also has a commercial interest inasmuch as in lieu of permitting the defendant No.1 to so photocopy the books, it is entitled to free photocopy of 3000 pages every month; (zn) it was demonstrated that the extent of copying of the textbooks in a course pack ranges from 5% of the

contents of the book to as much as 33.25% of the contents of the book and it was argued that the copying would thus qualify as substantial; (zo) attention was invited to *Hyde Park Residence Ltd. Vs. Yelland* (2001) Chancery 143 laying down that relief cannot be denied to the plaintiffs on the basis of 'public interest' where infringement of copyright has taken place because copyright has been statutorily made a property right and which statute also provides for exceptions in public interest and if the action does not fall within the exception, it is not open to otherwise deny relief in public interest; (zp) that the judgment of this Court in *The Chancellor, Masters & Scholars of the University of Oxford Vs. Narendera Publishing House* 185 (2011) DLT 346 relating to 'guide books' would have no application as the same was concerned with transliteration and not copying as is being done in the present case; (zq) that even otherwise, the matter cannot be left to public interest in view of statutory provisions and if the same is permitted, every judge would have his own view of public interest; (zr) that the matter has to be looked at not with a short sight but with a long term impact as allowing the photocopying as is going on to continue would adversely impact the publishing industry resulting in stoppage of publication of textbooks, at the cost of education and research; (zs) attention was invited to *Syndicate of*

The Press of The University of Cambridge Vs. B.D. Bhandari 185 (2011)

DLT 346, holding that the defence of 'fair use' as provided in Section 52(1)(h) is only available to the teacher and pupil to reproduce the literary work in the course of instructions or examination paper setter to reproduce any literary work as part of the questions or to the pupil to reproduce the literary work as answers to such questions and further holding that the publishers of commercial books were neither teachers nor students nor a person giving or receiving instruction and that if the defence of fair use is allowed to a publisher, then it would result in a situation where every publisher, without permission from the owner of copyright, would reproduce the *ad verbatim* literary text from the educational textbooks prescribed by the University and for commercial gains and benefits and that too without giving any royalty or payment to the right owners towards such a reproduction and thereby discourage creativity of authors who put their skill, labour, years of knowledge, expertise etc. into the educational books; (zt) '*Nimmer on Copyright*', Vol. 4 opining that if in every school room or library, by purchasing a single book demand of numerous are fulfilled through photocopy or similar device, the market for educational material would be almost completely obliterated was cited and the passage therein

titled “The Analogy to Hand Copies” where the learned author has opined that in evaluating the argument of library photocopy several factors must be considered, was also cited; (zu) a copy of ‘Study of Copyright Piracy in India’ sponsored by Ministry of Human Development, Government of India was handed over, also finding mass photocopying of books to be largely prevalent in India and the Institutions turning a blind eye thereto and recommending control thereof through a Copyright Clearance Centre and it was stated that in pursuance thereto, the IRRO has now been established; (zv) that the Commissioner appointed by this Court found that the books borrowed from the University Library were being photocopied in the shop of the defendant No.1; and (zw) lastly it was contended that grant of injunction will encourage IRRO as well.

15. The senior counsel for defendant No.4, SPEAK argued (i) that the course packs are a collection of material from the textbooks and carry an independent user right and do not affect the need for books; (ii) that out of 52 authors whose books are cited by the plaintiffs, 33 have given their no objection; (iii) that India is a developing country and very few are able to afford the cost of education; (iv) that the ratio of the material which is picked for use in the course pack vis-a-vis the entire book is miniscule; (v)

that the course packs are not designed by the teachers; (vi) attention was drawn to the Lok Sabha Debates of 22nd May, 2012 relating to the Amendment w.e.f. 25th June, 2012 to the Copyright Act, where it was stated that if a student wants to do research in copyrighted material he cannot be charged; if somebody wants to do research in copyrighted material, he cannot be charged; if somebody wants to teach copyrighted works, he cannot be charged; (vii) reliance was placed on *Academy of General Education, Manipal Vs. B. Malini Mallya* (2009) 4 SCC 256, laying down that when a fair dealing is made *inter alia* of a literary or dramatic work for the private use including research and criticism or review, no infringement can be claimed and that no injunction will be granted with respect to this as mentioned in Section 52 of the Act; (viii) reliance was placed on *Longman Group Ltd. Vs. Carrington Technical Institute Board of Governor* (1991) 2 NZLR 574 holding that in its ordinary meaning the words “course of instruction” would include anything in the process of instruction with the process 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 and that so long as the copying forms part of and arises out of the course of instruction, it would normally be in the course of instruction; it encompasses preparation of

material to be used in the course of instruction; (ix) that once reproduction i.e. photocopy is expressly permitted under Section 52, no limitation should be placed thereon; (x) that even in the judgment of the Supreme Court of Canada in *Province of Alberta* supra in the compilation of judgments of the plaintiffs, it was held that buying books for each student is not a realistic alternative to teachers copying short excerpts for distribution to the students as teachers merely facilitate wider access to the limited number of text books by making copies available to all students who need them; purchasing a greater number of original text book to distribute to students is unreasonable; such copying does not compete with the market for text books because if such copying did not take place, it was more likely that student would simply go without the supplementary information as buying is not a feasible option for them; (xi) that an extensive interpretation of the words “in the course of instruction” in Section 52 (1) (i) has to be given; (xii) that none of the students can be expected to purchase all the expensive text books, different chapters whereof are prescribed as a reading material in the curriculum/syllabus of the University; (xiii) that the larger public interest is in denying the injunction claimed; (xiv) attention was invited to para 34 of *Syndicate of The Press of The University of Cambridge* supra with respect

to 'fair use'; (xv) that reference books as are subject matter of this suit are used by many people other than students though text books have a narrower audience; even as per the plaintiffs, the percentage of the contents of a book photocopied in any of the course packs varied from 8% to 10% and dominant relationship of the entire content of the copyright work exists and the same has a negligible impact on market value; that even in the judgment of the Supreme Court of Canada in *CCH Canadian Ltd. Vs. Law Society of Upper Canada* 2004 SCC 13, it was held that the defendant did not authorise copyright infringement by maintaining a photocopier available in the Library and posting a warning notice that it would not be responsible for any copies made in infringement of copyright and on this basis it was argued that course packs containing prescribed reading material cannot amount to commercial exploitation; (xvi) that there can be no general principle in this regard and it has to be judged on a case to case basis as to whether there is any commercial impact from the action impugned; (xvii) that the test to be applied is, whether by the impugned action the book gets substituted; that if it does not, then there cannot be any violation - reliance in this regard was placed on the judgment dated 11th May, 2012 of United States District Court for the Northern District of Georgia (Atlanta Division) in *Cambridge*

University Press Vs. Mark P. Becker holding that small parts averaging around 10% of the whole copyrighted work did not substitute for the book and the court is required to consider whether the conduct engaged in by the defendant would result in a substantially adverse impact on the potential market for the original and if a professor used an excerpt of 10% of the copyrighted work and this was repeated by others many times, it would not cause substantial damage to the market for the copyrighted work because 10% excerpt would not substitute for the original, no matter how many copies were made; (xviii) that in Section 52(1)(i) restriction of 10% also does not exist and the only criteria is of effect on marketability; (xix) that no excerpt can be enough to replace a book; (xx) that the question has to be judged qualitatively and not quantitatively; (xxi) that all these are matters of trial and without which it will not be determined as to how much portion of the book has been copied and what damage has been caused thereby and hence no interim relief can be granted; (xxii) that the plaintiffs, to be entitled to an interim relief, have to establish loss and which has not been done till now; (xxiii) that this Court has to balance the competing interests of copyright owners and students; (xxiv) that though *Princeton University Press* supra has held that making of course packs as infringement in the

American context but what is applicable in Indian context is the dissenting opinion in the judgment where it was held that the identity of the person operating the photocopy machine is irrelevant as it makes no difference whether a student makes his or her own copies or students were to resort to commercial photocopying which is faster and more cost effective and that the censuring incidental private sector profit reflects little of the essence of copyright law; an example was given of a Professor's teaching assistant, who at times must, on the Professor's behest, make copies of the copyrighted text for supplying in the class and it was contended merely taking such assistance by the Professor would not make what is permissible, impermissible; (xxv) attention was invited to Para 22 of *Province of Alberta* supra to contend that Section 52 recognises the rights of others and that the Section 52 is not to be viewed/seen as a proviso or as an exception but as codifying rights of users to copyrighted material and there is no need to restrict the said rights; (xxvi) that the Supreme Court in *M/s. Entertainment Network (India) Ltd.* supra held that the Copyright Act seeks to maintain a balance between the interest of the owner of the copyright in protecting his works on the one hand and the interest of the public to have access to the works on the other and the two are competing rights between which a

balance has to be struck; (xxvii) that the Division Bench of this Court also in para 105 of *Syndicate of The Press of The University of Cambridge* supra held that copyright law is premised on promotion of creativity through sufficient protection on the one hand and the various exemptions and doctrines therein, whether statutorily embedded or judicially innovated, recognising the equally compelling need to promote creative activity and to ensure that the privileges granted by the copyright do not stifle dissemination of information on the other hand; (xxviii) that thus the rights under Section 52 have to be widely interpreted; (xxix) that the course packs contains a collection of wide ranging works; (xxx) that the Division Bench in *Syndicate of The Press of The University of Cambridge* supra had prescribed a 'four factor test' to be followed to determine fair use under Section 52(1)(a); (xxxi) that the effect on the market cannot be the sole criteria under Section 52(1)(i); (xxxii) that serious users of the books will not rely on course packs and therefore no serious commercial interest is hit and the miniscule commercial interest which is hit is within the permitted rights; (xxxiii) that the proportion of the copyrighted work included in the course packs is irrelevant as far as India is concerned; (xxxiv) that public interest has been accepted as the fourth ingredient in the grant of interim

relief; (xxxv) that the defendant No.2 University is not required to go to IRRO as it is exercising the rights recognised in Section 52 and only those who are exploiting the copyright are required to go to IRRO; (xxxvi) that the Indian law is different from the laws of other jurisdictions; (xxxvii) that the majority of the Judges in *Princeton University Press* supra disagreed with the dissenting judgment for the reason that the dissenting judgment would have been correct if the statute was correct and that is how the statute is in India; (xxxviii) that the actions of the defendants impugned would have been within the ambit of Section 52(1)(a) but the Legislature deemed it relevant to add Section 52(1)(i), though the ingredients thereof are within the ambit of Section 52(1)(a); (xxxix) that a benevolent provision cannot be given a restrictive interpretation; reference is made to *Nasiruddin Vs. State Transport Appellate Tribunal* AIR 1976 SC 331 to contend that the mere fact that the result of a statute may be unjust does not entitle a court to refuse to give effect thereto; (xl) that the purchasing power of students in India is much lower than students from other jurisdictions; (xli) that the price of the foreign books varies with the exchange rate; (xlii) reliance was placed on *Kartar Singh Giani Vs. Ladha Singh* AIR 1934 Lahore 777 followed in *Romesh Chowdhry Vs. Kh. Ali Mohamad Nowsheri* AIR 1965 J&K 101

holding that under the guise of the copyright, a plaintiff cannot ask the Court to close all the avenues of research and scholarship and all frontiers of human knowledge; (xliii) attention was drawn to the article “Exceptions and Limitations in Indian Copyright Law for Education: An Assessment” by Lawrence Liang published in 2010 in Volume 3, Issue 2 of The Law and Development Review dispelling the common assumption that the cost of books in India was low and reporting that the cost of books in proportion to the average income in India was high; (xliv) that course packs have been available in the University since the year 2001 and the plaintiffs, who as per their claim are 200 years old Publishing Houses present in India for more than 50 years have acquiesced in the same; (xlv) reliance was placed on *M/s Power Control Appliances Vs. Sumeet Machines Pvt. Ltd.* (1994) 2 SCC 448 in support of the plea of acquiescence; (xlvi) that the plea in para 19 of the plaint of the plaintiffs having learnt of the course packs, just prior to the institution of the suit, is unbelievable; (xlvii) that the plaintiffs have been vigilant about their rights and have otherwise been filing cases to prevent infringement of their copyright and it is unbelievable they would not have known of the course packs; (xlviii) that the course packs have become a vital part for access to knowledge and the injury if any ultimately found to the

plaintiffs can be compensated with money; (xlix) reliance in this regard is placed on *Dalpat Kumar Vs. Prahlad Singh* (1992) 1 SCC 719 holding that the burden of proving that there exists a *prima facie* case and infraction thereof and that the damage would be irreparable and the balance of convenience is in favour of injunction is on the plaintiffs; (l) reliance is placed on *Helen C. Rebello Vs. Maharashtra State Road Transport Corporation* (1999) 1 SCC 90 laying down that whenever there are two possible interpretations of a beneficial legislation then the one which subserves the object of the legislation with benefit to the subject should be accepted; (li) reliance was placed on *ESPN Star Sports Vs. Global Broadcast News Ltd.* 2008(38) PTC 477 (Del) to contend that in the absence of any imminent threat or danger of legal injury of the kind that damages or a claim which money cannot compensate, no injunction can be granted; (lii) that once it is found that the injury if any would be compensable, it matters not whether the compensation would be recoverable or not; (liii) that Section 52(1)(h) is in the context of guide books which are published not by the teachers but by others and it is for this reason only that a restriction on the number of passages have been placed therein; on the contrary, Section 52(1)(i) is for teachers and pupil and in the context whereof no restriction

whatsoever has been deemed appropriate by the Legislature; reliance was placed on *Bombay Gas Co. Ltd Vs. Gopal Bhiva* (1964) 3 SCR 709 to contend that failure of the legislature to limit the scope of Section 52(1)(i) cannot be deemed to be accidental omission; (liv) that the course packs are not covered by Section 52(1)(h); (lv) reliance is placed on *Ramnijklal N. Bhutta Vs. Maharashtra* (1997) 1 SCC 134 laying down that even in a civil suit, in granting of injunction or other similar order more particularly of an interlocutory nature, the Courts have to weigh the public interest vis-à-vis the private interest; (lvi) reliance in this regard is also placed on *State of Uttar Pradesh Vs. Ram Sukhi Devi* AIR 2005 SC 284; (lvii) that in the present case, the four factor test of the purpose being education, being non-benefit oriented, not-amounting to plagiarism and copying being only of the prescribed part, are satisfied; (lviii) that without examining the nature and character of each of the course packs, no relief can be granted.

16. The counsel for the defendant No.1 argued (a) that the actions of the defendant No.1 impugned in this suit are licensed by the defendant No.2 University and the defendant No.1 has been acting strictly in accordance therewith; (b) that the rate charged by the defendant No.1 of 40 paise per page for photocopying is an inclusive charge / binding charge and there is no

commercial angle thereto; (c) that the plaint does not comply with the provisions of Order IV Rule 1 of CPC; (d) that no resolution of the Board of Directors of any of the plaintiffs companies authorising the institution of the suit have been filed; (e) that the damages if any have to be awarded against the defendant No.2 University only as the defendant No.1 has merely been acting as the agent / licensee of the defendant No.2 University; (f) drew attention to Articles 39(f) and 41 of the Constitution of India constituting giving of opportunities and facilities to children to develop in a healthy manner, protected from exploitation and right to education as Directive Principles of State Policy; otherwise the counsel for the defendant No.1 adopted the arguments of the senior counsel for the defendant No.2 University.

17. The counsel for the defendant No.3 ASEAK adopted the arguments of the other counsels.

18. The senior counsel for the defendant No.2 University argued (i) that the question as has arisen has not arisen in the country till now; (ii) that the question, though relating to copyright law, has to be judged in the light of the right to access to knowledge; (iii) that the right to education finds mention in the Constitution not only as a Fundamental Right but also as a

Directive Principle of State Policy; (iv) that access to education is a cherished constitutional value and includes within it access for students to books in library and right to research and to use all materials available; (v) that there is no dispute that a copyright would certainly subsist in the works published by the plaintiffs but it is to be examined whether the said copyright vests in the plaintiffs or not; (vi) that abstraction of work is not the same as reproduction of work mentioned in Section 14(a)(i) defining copyright, though reproduction would include reproduction by photocopy; (vii) that a teacher cannot have a photocopying machine with him / her; (viii) that education has always been a time honoured exemption to copyright law; (ix) that the copyright law has always exempted reproduction for the purpose of education, research and teaching assuming it to be an intrinsic right of academicians; (x) that similarly copyrighted material can be used by Judges and policy makers without infringing the copyright; (xi) that what has statutorily been made to be not infringement of copyright cannot be infringement of copyright; (xii) that for the interpretation of Section 52 it is immaterial whether it is taken as an exception to infringement or creating independent rights; (xiii) that photocopying in entirety of school books is permitted but the need therefor does not arise because they are subsidised;

(xiv) that it matters not whether the full book is photocopied or only a part of the book is photocopied as long as the purpose remains educational; (xv) that Section 52(1)(i) takes within its ambit reproduction of the entire work because it is for non-commercial purposes; (xvi) that limitation of two passages to the extent of reproduction permitted under Section 52(1)(h) is for the reason that it is for commercial exploitation; (xvii) that there is a difference between publication and reproduction; (xviii) that 'publication' has been defined in Section 3 of the Act as making a work available to the public by issue of copies or by communicating the work to the public; (xix) that on the contrary, Section 2(x) defines 'reprography' as making of copies of a work, by photocopying or similar means; (xx) that for publication within the meaning of Section 3 of the Act, the act has to be of making the work available or communicating the work "to the public"; students are not public; that the test to be applied under Section 52 is to be of intention; (xxi) attention in this regard was invited to Articles 9 & 11(2) of the Berne Convention relating to right of reproduction and leaving it to the legislation in the countries to the Convention to determine the conditions under which the rights mentioned in the preceding paragraphs may be exercised subject to the same being not prejudicial to the moral right of the author to equitable

remuneration; the entire scheme of the Copyright Act was gone into in *Entertainment Network (India) Ltd.* supra and it was held that all provisions have to be read together and that profit is irrelevant to test infringement; (xxii) however Sections 51 & 52 make profit an indice and the Division Bench of this Court in paras 63 and 105 of *Syndicate of The Press of The University of Cambridge* supra also mentioned commercial exploitation; (xxiii) that the defendant No.2 University is not shying from full responsibility for the actions; (xxiv) that students are integral part of the University; (xxv) that thus anything done by the University, even if students make use thereof is one and the same act; (xxvi) that Section 52(1)(g), as it stood prior to 2012 Amendment and which is equivalent of the present Section 52(1)(h), used the words 'publication' and 'educational institution' and which included selling to public and not necessarily to students only; (xxvii) that by the amendment, the word 'educational institution' has been deleted, lifting the limitation and now there is no limitation for educational institutions as under old Section 52(1)(g); (xxviii) that thus whatever is for education is not infringement; (xxix) that the plaintiffs also do not call the defendant No.1 a publisher; (xxx) that a chart of the quantum of reproduction in the various course packs was handed over to demonstrate

that the percentage of the work copied from any textbook varies from 1.62% to 30.09% with the average quantum of reproduction in the four course packs of which details are given in the plaint varying from 7.3% to 19.5%; (xxxix) that the course packs are given as advance reading material; (xxxix) that the plaintiffs want Section 52(1)(i) to be read as Section 52(1)(a) when the language of the two is materially different; (xxxix) that while in Section 52(1)(a) there is a test of fair dealing, there is no such test in Section 52(1)(i); (xxxix) that repeated photocopying of the book by students damages the books; (xxxix) that the books which are photocopied are not textbooks but disseminate knowledge; (xxxix) that grant of an injunction would be against dissemination of knowledge; (xxxix) that there is no pleading by the plaintiffs of violation of Section 52(1)(i); (xxxix) that the defendant No.2 University is willing to give an undertaking to not indulge in photocopying for commercial motive; (xxxix) that publication is never limited to a view; (xl) reliance is placed on *Estate of Martin Luther King JR. Inc. Vs. CBS Inc.* 194 F.3d 1211 (11th Cir. 1999) where the United States Court of Appeals Eleventh Circuit held publication occurs if tangible copies of the work are distributed to the general public in such a manner as allows the public to exercise dominion and control over the work and that in

copyright law, performance of a speech does not constitute publication; (xli) that the students cannot be burdened with societal / class right; (xlii) attention was invited to Lawrence Liang's article supra; (xliii) attention was invited to the article "Exhausting Copyrights and Promoting Access to Education: An Empirical Take" published in Volume 17 of July 2012 Edition of the Journal of Intellectual Property Rights, opining that the purpose of copyright is greater access; (xliv) attention was invited to *Longman Group Ltd.* supra where the High Court of Auckland held that the words "course of instruction" encompasses preparation of the material to be used in the course of instruction and copying of the material to be used in the course of instruction by a teacher before the delivery of the instruction and that copying prior to a class is in the course of instruction provided it is for the purpose of instruction; (xlv) that Section 107 of the United States Copyright Act, 1976 is different and thus the judgment of the US Court of Appeal, Sixth Circuit in *Princeton University Press* supra relied upon by the plaintiffs is not applicable; (xlvi) that even otherwise applying the four factor test, there is no infringement; (xlvii) that though Universities were part of reprographic society in Canada but have broken off their ties therefrom; (xlviii) that the TRIPS Agreement also accepts exemptions to

copyright; (xlix) that no premium can be put on knowledge; (l) that the tuition fee in the defendant No.2 University is subsidised and at interim stage there should be no injunction; (li) that education was never meant to be exploitative; (lii) that in all jurisdictions education is treated separately and has a special status; that Article 26 of the Declaration of Human Rights also provides for a right to education; (liii) that no legitimate rights of any of the publishers have been infringed; (liv) that though the defendant No.2 University had nothing to do with the impugned acts but is taking up the matter in the interest of the students; (lv) that the test of fairness is not quantitative but qualitative; (lvi) that the defendant No.2 University is willing to give or distribute the course packs only to students with Identity Card, not to allow profit of more than 2 paise per page to defendant No.1; (lvii) that if the University were to employ its own staff for photocopying, the cost would be much more; (lviii) that the knowledge seeker has to be on a different pedestal; (lix) that there are no textbooks in post-graduation and the students have to study from different suggested reading materials; (lx) that the prayers in the suit are vague; (lxi) that though IRRO provides a via-media but its prescribed agreement is very narrow; (lxii) that IRRO has filed

a writ petition challenging the constitutionality of Section 33A requiring it to publish a tariff scheme.

19. Though the counsel for the defendant No.3 had earlier adopted the arguments of the other counsels but subsequently contended (A) that instruction begins when the academic session commences; dictionary meaning of the word 'instruction' and different provisions of the Copyright Act where the said word has been used were cited; (B) that once any part of any copyrighted work is included in the syllabus of the University, Section 52(1)(i) applies; (C) that Section 2(n) defines 'lecture' as including addresses, speeches and sermons; (D) that had the intention of the Legislature been to confine Section 52(1)(i) to lectures as is the case of the plaintiffs, the word 'lecture' would have been used and not the word 'instruction'; (E) that Section 52(1)(i) is not limited to classroom education; (F) reliance was placed on para 26 of *Nasiruddin* supra to contend that plain meaning of the word 'instruction' is to be adopted and which is wide; (F) reliance in this regard was also placed on *Bombay Gas Co. Ltd.* supra; (G) that *Princeton University Press* supra was a case of a commercial photocopy shop outside the University; (H) that the defendant No.1 is reproducing and not publishing; (I) that if University itself is entitled to

make the course packs, the fact that it is doing through an agent should not make a difference; (J) that there is no fear of publishing industry collapsing as is canvassed by the counsel for the plaintiffs; (K) that a short note on the growth of Indian Publishing Industry is included in the compilation handed over.

20. The counsel for the plaintiffs in rejoinder argued (I) that the course packs are sold like text books; (II) that the objective of this litigation is not to compel the buying of books but to compel the defendant No.2 University to enter into a licencing agreement with IRRO which is now fully functional; (III) that IRRO is the only Society registered under Section 33 of the Act; (IV) that earlier IRRO permitted only 20 copies to be made but now permits 15% of the copyrighted work to be copied; (V) that if the defendant No.2 University feels that 15% is less, it can challenge the same before the Copyright Board and the Copyright Board is now empowered to give interim orders also; (VI) that the argument of public interest is a myopic argument; (VII) that if injunction would be refused there would be no incentive for new literary work; (VIII) that even if the academicians continue to write for themselves, the publishers would not be willing to publish; (IX) that Section 52 sets out the public interest policy and the policy

having been statutorily laid down, there could be no public interest outside Section 52; (X) that copyright would become useless if the entire work were allowed to be copied under Section 52(1)(i); (XI) that the judgment in *Cambridge University Press Vs. Mark P. Becker* supra relied upon by the defendants was reversed in appeal and in any case concerned digital copy and not paper course packs; (XII) that if Section 52(1)(i) were to be as wide as contended by the defendants, there would have been no need for Section 52(1)(zb).

21. I have considered the aforesaid contentions, judgments and other material cited and gone through the written arguments.

22. Though the defendants in their written statements have disputed the copyright claimed by the plaintiffs but I am of the view that now that the senior counsel for the defendant No.2 University has given up the stand taken in the written statement and has stated that the defendant No.2 University takes full responsibility for the making of the course packs, the question, whether the copyright therein vests in the plaintiffs or in some other person, is of no relevance as the defendant No.2 University, as State within the meaning of Article 12 of the Constitution of India, cannot be seen as violating the law by infringing the copyright, whether it vests in the

plaintiffs or in some other person. The only question to be adjudicated thus is, whether the making of course-packs as the defendant No.2 University is making, amounts to infringement of copyright. The said question, according to me, is a question of law and requires no trial. As would be evident from above, we have before us the range of percentage of the contents from each book being photocopied and included in the course pack. No evidence to that effect is required. If the actions of the defendant No.2 University, on an interpretation of law, are held to be infringement, a decree for permanent injunction has to follow. Conversely if the actions of defendant No.2 University are not found to be amounting to infringement of copyright, the suit fails. Of course if it is held that what the defendant no.2 University is doing is infringement of copyright and the author or publisher of a particular work has granted permission to the defendant no.2 University to make copies thereof, as the defendant no.2 University claims, the defendant no.2 University would be entitled to do so.

23. Though at one point of time during the hearing it appeared that a direction to the defendant No.2 University to approach IRRO, a Copyright Society within the meaning of Section 33 of the Copyright Act, offered a solution to the issue as has arisen but on further consideration I tend to agree

with the senior counsels for the defendant No.2 University and defendant No.4 SPEAK that the question of issuing any such direction would arise only upon finding that what the defendant No.2 University is doing is not covered by Section 52 of the Act and which would make it an infringement of the copyright and to avoid which it can go before IRRO.

24. To be able to gauge the full import of Section 52 of the Copyright Act, I have examined the provisions of the said law from the beginning of the statute.

25. The Copyright Act was enacted “to amend and consolidate” the law relating to copyright. Copyright forms part of the bouquet of intellectual property rights and I have wondered whether copyright is also a natural right or a common law right which vests in the author or composer or producer of the work and thus whether in the absence of anything to the contrary contained in the Copyright Act, the attributes of ownership, as with respect to other forms of property, would enure to copyright also. Mention may be made of *K.T. Plantation Pvt. Ltd. Vs. State of Karnataka* (2011) 9 SCC 1 where a Constitution Bench of the Supreme Court held that Article 300A of the Constitution proclaims that no person can be deprived of his property

save by authority of law, meaning thereby that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without any support of law made by a competent legislature and that the expression 'property' in Article 300A is not confined to land alone but also includes intangibles like copyright and other intellectual property and embraces every possible interest recognised by law.

26. Section 13 of the Act defines the works in which copyright subsists but makes the same subject to the provisions of that Section as well as other provisions of the Act. The same leads me to form an opinion that copyright, though may subsist under the natural law in any work, has been made subject to the statute and if the statute limits the works in which copyright subsists, there can be no natural copyright therein.

27. Section 14 of the Act gives the meaning of copyright as the exclusive right, again “subject to the provisions” of the Act, to do or authorize the doing of the acts listed therein in respect of the work in which the copyright subsists. The same is again indicative of the author, composer or producer having only such rights which are prescribed thereunder and that too subject to the other provisions of the Act. In relation to literary works, with which

we are concerned, one such right is the right to reproduce the work or any substantial part thereof. However if any other provision of the Act is to provide otherwise, the same will cease to be the copyright. Similarly, Section 2(m) defines “infringing copy” as meaning in relation to literary works, a reproduction thereof, if made in contravention of the Act, meaning, if any provision of the Act permits any person to reproduce any work or substantial part thereof, such reproduction will not be infringing copy.

28. The position becomes unequivocally clear from Section 16 which provides that no person shall be entitled to copyright or any similar right in any work otherwise than under and in accordance with the provisions of the Copyright Act. The same unequivocally prescribes that there is no copyright except as prescribed in the Act, converting copyright from a natural or common law right to a statutory right.

29. Section 51 prescribes that copyright is infringed *inter alia* when any person does anything exclusive right to do which has been conferred by the Act on the owner of copyright. It follows, if there is no exclusive right, there is no infringement. Section 52 lists the acts which do not constitute infringement. Thus, even if exclusive right to do something constitutes

copyright, if it finds mention in Section 52, doing thereof will still not constitute infringement and the outcome thereof will not be infringing copy within the meaning of Section 2(m). Section 55 also, entitles the owner of copyright to remedies by way of injunction, damages, accounts or otherwise as are conferred by law for infringement of a right, only when copyright is infringed and except as otherwise provided by the Copyright Act. Thus unless there is infringement of copyright within the meaning of the Act, owner of copyright is not entitled to sue.

30. A Division Bench of this Court in ***Time Warner Entertainment Company, L.P. Vs. RPG Netcom*** (2007) 140 DLT 758 held that copyright cannot be claimed and suit for infringement of copyright cannot be maintained *de-hors* the Copyright Act and that the Common law rights to copyright were abrogated, earlier by Section 31 of the Copyright Act, 1911. It was held that a person is entitled to copyright only under the provisions of the Copyright Act and any other statutory enactment in force. Supreme Court also, in ***Entertainment Network (India) Ltd.*** supra held that copyright unlike trademark is a right created under the Act and that when a author claims a copyright, the right has to be determined with reference to the provisions of the Act. Recently, in ***Krishika Lulla Vs. Shyam Vithalrao***

Devkatta (2016) 2 SCC 521, copyright was held to be a statutory right requiring statutory conditions to be satisfied.

31. Copyright as a natural or common law right has thus been taken away by the Copyright Act.

32. I conclude, there can be no copyright in any author, composer or producer save as provided under the Copyright Act. Axiomatically if follows, unless the action of defendants No 1 and 2 amounts to infringement of copyright within the meaning of the Copyright Act, the plaintiffs or any other person in whom copyright vests cannot sue for infringement or damages or accounts, as have been claimed in the plaint.

33. I have next wondered, whether making of copies by the defendant no.2 University (for the time being I am not entering into the controversy whether making of copies by the defendant no.1 under the arrangement as pleaded with the defendant no.2 University makes any difference) of the books purchased by the defendant no.2 University and kept in its library and distributing the said copies to its students (I am again at this moment not entering into the controversy whether the charging by the defendant no.2 University makes any difference) amounts to defendant no.2 University

doing any of the acts which vests exclusively in the owner of the copyright in the said books and to infringement of copyright.

34. It is not in dispute that the works in question fall in the category of original literary work. Section 14(a)(i) and (ii), in respect of such works, vests the exclusive right “to reproduce the work in any material form including the storing of it in any medium by electronic means” and the right “to issue copies of the work to the public not being copies already in circulation” in the owner of the copyright. I have wondered, whether “to reproduce the work” would include making photocopies thereof as the defendant No.2 University is doing. The word “reproduce” has not been defined in Section 2 of the Act though i) Section 2 (hh) defines “duplicating equipment” as any mechanical contrivance or device used or intended to be used for making copies of any work; ii) Section 2(s) defines “photograph” as including photo-lithograph and any work produced by any process analogous to photography; and, iii) Section 2(x) defines “reprography” as making copies of a work by photo-copying or similar means. On the basis thereof, I conclude that the words in Section 14(a)(i) “to reproduce the work” would include making photocopy of the work in contravention of the provisions of the Act. I have in *Continental Telepower Industries Ltd. Vs.*

Union of India MANU/DE/1691/2009 held that a photocopy is certainly a copy. Long back, in *British Oxygen Company Ltd. Vs. Liquid Air Ltd.* 1925 Ch. 383 also it was held that making photographic copy of literary work is reproduction thereof. I thus conclude that the right to make photocopies is the exclusive right of the author or composer of the literary work and a copyright within the meaning of Section 14. Axiomatically, the making of photocopies by the defendant No.2 University will constitute infringement of copyright within the meaning of Section 51 and the photocopies so made constitute infringing copy within the meaning of Section 2(m) unless such act is listed under Section 52 as an act not constituting infringement.

35. It is noteworthy that Section 14(a)(i) constitutes right to reproduce literary work *per se* as copyright and Section 51(a)(i) constitutes such reproduction *per se* as infringement of copyright and Section 2(m) constitutes the copy so reproduced as infringing copy. Infringement is complete on reproduction of the work. To constitute infringement, it is not necessary that the person who has so reproduced the work, should put it to any use or should distribute or sell the same to others. However Section 14(a)(ii) also vests the exclusive right to issue copies of the work to the

public not being copies already in circulation, in the owner of the copyright and constitutes the same as copy right. Thus the action of issuing copies of the work to public would also constitute infringement of copyright under Section 51. Neither Section 14(a)(ii) nor Section 51(a)(i) require such issuance of copies to be for consideration or to make profit. Issuance of copies even if without any charge thus constitutes infringement of copyright. The Explanation to Section 14 however provides that for the purpose of that Section, “a copy which has been sold once shall be deemed to be a copy already in circulation”. Thus, the books in which the plaintiffs claim copyright, purchased by the defendant no.2 University, as per the said Explanation, are deemed to be a copy already in circulation within the meaning of Section 14(a)(ii) and the exclusive right to issue the same to the public does not vest in the owner of the copyright and does not constitute copyright and the defendant no.2 University would be entitled to issue the said books to the public. This is the principle of ‘exhaustion’ that perhaps is the genesis of libraries, not only of Universities and other educational institutions but run and operated otherwise and commercially also, and of the business of resale of books.

36. I must record that the thought has indeed crossed my mind, whether the words “to issue copies of the work to the public not being copies already in circulation” used in Section 14(a)(ii) entitles the purchaser of a copy of copyrighted work and which copy as per Explanation to Section 14 is a copy already in circulation, to make more copies of the said work for issuance thereof to the public as the defendant No.2 University is doing but have concluded that the words “to issue copies of the work” cannot be read/interpreted as “to make copies of the work” and which under Section 14(a)(i) is the exclusive right of the author and composer and that the purport of Section 14(a)(ii) is only to not vest in the owner of copyright any right to further issue to public a copy which he has already once issued. If the words “to issue copies of the work” were to be read also as “making copies of the work”, the same would tantamount to the owner of copyright after having once sold a copy thereof, being left with no right to restrain the person who has purchased the copy from making further copies thereof and selling the same.

37. The defendant No.2 University thus, though entitled to issue the books, published by the plaintiffs and purchased by it and kept by the defendant No.2 University in its library, to whosoever is entitled to issuance

of the said books from the library, per Section 14(a)(i) and Section 51(a)(i) would not be entitled to make photocopies of substantial part of the said book for distribution to the students and if does the same, would be committing infringement of the copyright therein.

38. Section 51 however besides vide clause (a)(i) thereof constituting the doing of acts exclusive right to do which under Section 14 vests with the owner of the copyright, an infringement, vide clause(a)(ii) and (b) thereof also constitutes, permitting any place to be used for communication of the work to the public where such communication constitutes infringement of copyright and sale/hire or otherwise dealing in infringing copies of the work, as infringement of copyright; however for the said actions to constitute infringement, the same have to be shown to be for profit or by way of trade. What emerges therefore is that while doing of something exclusive right to do which vests in the owner of the copyright constitutes infringement of copyright irrespective of whether there is any commercial element therein or not, facilitating infringement and dealing in infringing copies constitutes infringement only if done with commercial element.

39. That takes me to Section 52 which forms the pivot of the rival contentions. Section 52 lists acts, which even if infringement per Section 51 read with Section 14, have been statutorily declared to be not constituting infringement of copyright. But for Section 52 the acts listed thereunder would have constituted infringement of copyright.

40. Before proceeding to deal with the acts listed under Section 52 and on which arguments were addressed, I will take up first the question whether interpretation of Section 52 is to be by applying the rules of interpretation as applicable to a proviso or an exception, to Section 51.

41. Having considered the provisions of (i) Section 2(m) constituting reproduction of literary work as an infringing copy only if such reproduction or copy is made in contravention of provisions of the Act; (ii) Section 14 making the exclusive rights which flow from ownership of copyright subject to the provisions of the Act; (iii) Section 16 making ownership of copyright statutory; and, (iv) Section 51(a)(i) which by reference to Section 14, incorporates therein the condition of “subject to provisions of this Act”, I am of the view that a) the legislature having abrogated the natural or common law rights of authors and composers; and b) and having statutorily enacted

what is copyright; and c) having made what is copyright also subject to other provisions of the Act; and d) having in successive provisions of the Statute prescribed “when copyright infringed” and “certain acts not to be infringement of copyright”; and e) having vested the right to civil remedies only to situations when copyright is infringed, the rules of interpretation of Statutes as applicable to Proviso and Exception cannot be applied to Section 52 of the Copyright Act. Once the acts listed in Section 52 are declared as not constituting infringement of copyright and the reproduction of work resulting from such acts as not constituting infringing copy, it follows that the exclusive right to do the acts mentioned in Section 52 has not been included by the legislature in the definition in Section 14; of copyright, once that is so, the doing of such act cannot be infringement under Section 51 and the question of taking the same out by way of proviso or exception does not arise. Supreme Court, in *Nand Kishore Mehra Vs. Sushil Mehra* (1995) 4 SCC 572, dealing with Sections 3(1) and 3(3) of the Benami Transactions (Prohibition) Act, 1988 which prohibits a person from entering into any *benami* transaction, Section 3(2) which permits a person to enter into a *benami* transaction of purchase of property in the name of his wife or unmarried daughter and Section 4 of the said Act which prohibits a person

from enforcing rights in a property held *benami*, held that to hold that a person who is permitted to purchase a property *benami* in the name of his wife or unmarried daughter cannot enforce his rights in the property would amount to holding that the Statute which allows creation of rights by a *benami* transaction also prohibits enforcement of such rights, a contradiction which can never be attributed to a Statute. Similarly here, to hold that inspite of the legislature having declared the actions listed in Section 52 to be not amounting to infringement, the same have to be viewed putting on the blinkers of being infringement would amount to holding that the Copyright Act which allows actions listed in Section 52 to be done without the same constituting infringement and consequences thereof not constituting infringing copy, cannot be done to the extent permitted by the language of Section 52. I thus agree with the contention of the senior counsel for the defendant no.2 University that the rights of persons mentioned in Section 52 are to be interpreted following the same rules as the rights of a copyright owner and are not to be read narrowly or strictly or so as not to reduce the ambit of Section 51, as is the rule of interpretation of statutes in relation to provisos or exceptions. Thus, Sections 14 and 51 on the one hand and Section 52 on the other hand are to be read as any two provisions of a

statute. Reliance by defendants on *Entertainment Network (India) Ltd.* supra in this respect is apposite. It was held that the Copyright Act seeks to maintain a balance between the interest of the owner of copyright in protecting his works on the one hand and interest of the public to have access to the works, on the other.

42. The next question to be considered is whether the actions of the defendant no.2 University are to be tested on the anvil of Clauses (h),(i),(j) of Section 52(1) which deal with acts in relation to education or also on the anvil of Clause (a) of Section 52(1) which deals with an acts for purposes of private or personal use, criticism or review or reporting of current events, if in fair dealing with the work.

43. The various clauses under Section 52(1) deal with different factual situations. I am of the view that once the legislature has in Clauses (h), (i), (j) under Section 52(1) provided specifically for the field of education/instruction, the scope thereof cannot be expanded or restricted by applying the parameters of the omnibus or general Clause (a). It is a well known rule of construction that general provisions yield to special provisions. Supreme Court in *J.K. Cotton Spinning & Weaving Mills Co.*

Ltd. Vs. State of Uttar Pradesh AIR 1961 SC 1170 held that this rule has not been arbitrarily made by lawyers and judges but springs from common understanding of men and women that when the same person gives two directions, one covering a large number of matters in general and another to only some of them, his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. This rule was recently reiterated in *Commercial Tax Officer Vs. Binani Cements Ltd.* (2014) 8 SCC 319. I thus hold Section 52(1)(a) to be having no applicability to the impugned action. Thus the extent of Section 52(1)(h), (i), (j) or whichever one is found applicable to specific situation with which we are concerned, cannot be widened or restricted by applying the parameters of Section 52(1)(a).

44. Section 52(1)(h) does not constitute as infringement the publication in a collection, mainly composed of non-copyrighted matter, *bona fide* intended for instructional use, of short passages from copyrighted work provided that not more than two such passages from the copyrighted work are so included.

45. However for Section 52(1)(h) to apply, there has to be firstly a “publication” and secondly “mainly composed of non-copyrighted matter”. Though the course packs with which we are concerned in this suit may qualify as a collection within the meaning of Section 52(1)(h) but the said collection according to the plaintiffs also is entirely of copyrighted matter. For Section 52(1)(h) to apply the said collection has to be mainly of non-copyrighted matter. For this reason alone, in my opinion, the question of applicability of Section 52(1)(h) to the subject factual situation does not arise.

46. I have also wondered, whether the action of the defendant no.2 University impugned in the present suit i.e. of making photocopies of different copyrighted works and supplying the said photocopies to the students amounts to “publication” within the meaning of Section 52(1)(h).

47. The meaning of “publication” given in Section 3 of the Copyright Act for the purposes of the said Act is, making a work available to the public by issue of copies or by communicating the work to the public. Significantly Section 3 is not qualified with the words “except where the context otherwise requires”. On first impression, making of copies of copyrighted

work and making the same available to the students would amount to publication within the meaning of Section 3 of the Act. Though the senior counsel for the defendant no.2 University has argued that the students cannot be construed as “public” but neither has any reason therefor been cited nor am I able to find any. In my opinion students would not cease to be “public”.

48. However strangely enough Section 14 of the Act while prescribing the meaning of copyright as the exclusive right to do the acts which are listed thereunder does not use the word “publication”, though in relation to literary works, Clause (a)(ii) thereunder vests in the owner of the copyright exclusive right to issue copies of the work to the public and which according to me would fall within ‘publication’ within the meaning of Section 3 of the Act. The same leads me to infer that the word “publication” in Section 3 refers to an act of preparation and issuing of a book, journal or piece of music for public sale as the plaintiffs are doing and does not refer to the act of making photocopies of a already published work and issuing the same. The meaning ascribed in Section 3 to ‘publication’ becomes clear on reading thereof with Section 4 titled “When work not deemed to be published or performed in public” and Section 5 titled “When work deemed to be first published in India” and is found to be in the context of being made available

to the public for the first time. When photocopies of an already published work are made, the same does not amount to making the work available to the public for the first time. Even otherwise it is a settled principle of interpretation that the definition even if given in a Statute to any word may not apply to the word used in another provision of the Statute if the context does not so permit. Supreme Court in *Commissioner of Sales Tax Vs. Union Medical Agency* (1981) 1 SCC 51 held that it is well settled principle that when a word or phrase has been defined in the interpretation clause, *prima facie* that definition governs whenever that word or phrase is used in the body of the statute; but where the context makes the definition clause inapplicable, a defined word when used in the body of the statute may have to be given a meaning different from that contained in the interpretation clause; all definitions given in an interpretation clause are therefore normally enacted subject to the usual qualification -"unless there is anything repugnant in the subject matter or context", or "unless the context otherwise requires"; even in the absence of an express qualification to that effect, such a qualification is always implied.

49. Once Section 52(1)(h) is held to be not applicable, the contentions of the counsel for the plaintiffs, of the actions of the defendant no.2 University impugned in this suit constituting infringement owing to photocopying by the defendant no.2 University being of more than two short passages of each of the copyrighted work, also falls.

50. It is nobody's argument that Section 52(1)(j), though also pertaining to education and making performance, in the course of activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution, if the audience is limited to such staff and students, the parents / guardians of students and persons connected with activities of institution as not constituting infringement of copyright applies to the factual situation subject matter of adjudication.

51. The adjudication thus has to be only on the anvil of Section 52(1)(i) which constitutes, the reproduction of any work i) by a teacher or a pupil in the course of instruction; or ii) as part of the questions to be answered in an exam; or ii) in answers to such questions, not to be infringement of copyright .

52. The act of making of photocopies by the defendant no.2 University, as I have held hereinabove, is reproduction of copyrighted work by the defendant no.2 University.

53. However for the action of reproduction of such work by the defendant no.2 University to, under Section 52(1)(i), not constitute infringement of copyright in the said works, the same has to be “by a teacher or a pupil in the course of instruction”.

54. Though not addressed by either counsel but I have also considered whether the defendant no.2 University which is reproducing the work by making photocopies thereof would fall within the meaning of the word “teacher” in Section 52(1)(i). Significantly Section 52(1)(j) which prescribes the action of performance of a literary, dramatic or musical work by the staff and students as not constituting infringement uses the words ‘educational institution’ and which are conspicuously missing in Section 52(1)(i). The questions arise a) whether owing to the difference in language between Sections 52(1)(i) and 52(1)(j) with Section 52(1)(i) using the words “teacher” and “pupil” and Section 52(1)(j) using the words “staff” and “students” of “educational institution” it has to be held that Section 52(1)(i)

is not applicable to defendant no.2 University as an educational institution; or (b) whether the scope of Section 52(1)(i) is restricted to the actions of an individual teacher and an individual pupil or extends to action of the institution and its students.

55. On consideration, I am of the view that the scope and ambit of Section 52(1)(i) cannot be so restricted. The settled principle of interpretation of statutes is that the legislature is to be deemed to have used the language in the context of the prevailing laws and societal situations to which the legislation is intended. Education in the country though at one time pursued in *Guru-Shishya parampara* (Teacher – disciple tradition) has for long now been institutionalised, both at school and post - school level, with imparting of education by a teacher individually having no recognition. There is no reason to interpret Section 52(1)(i) as providing for an individual teacher and an individual pupil and which, neither at the time of inclusion thereof in the statute nor now exists in the society. Supreme Court, in ***S.P. Gupta Vs. President of India*** 1981 Supp (1) SCC 87 held that interpretation of every statutory provision must keep pace with the changing concepts and it must, to the extent to which its language permits, or rather does not prohibit, suffer adjustments so as to accord with the requirements of fast growing society.

Similarly in *The State of Maharashtra Vs. Dr. Praful B. Desai* (2003) 4 SCC 601 it was held that in construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. The phrase ‘purposes of teaching, research or scholarship’ vide Section 32(6) Explanation (d), though for the purpose of that Section only, has been defined as including “purposes of instructional activity at all levels in educational institutions, including Schools, Colleges, Universities and tutorial institutions” and “purposes of all other types of organized educational activity”. I have no reason to hold that the legislature intended to exclude teacher and pupil in an educational institution as defendant no.2 University is, from ambit thereof. Thus, merely because imparting of education by teachers today is as part of an institution as the defendant no.2 University and it is the defendant no.2 University which on behalf of its teachers is reproducing any copyrighted work by making photocopies thereof, would not mean that Section 52(1)(i) would not be applicable. The counsel for the plaintiffs also, to be fair to him, has not contended so.

56. I may at this stage deal with another contention i.e. of substitution the words “intended for the use of educational institutions” in Section 52(1)(g)

as it stood prior to the, amendment of the year 2012 of the Copyright Act with the words “intended for instructional use” in equivalent Section 52(1)(h) post amendment. The only effect of such substitution in my view is to expand/widen the scope thereof. ‘Instruction’ is not confined to Educational Institutions or Establishments. The word ‘instruction’ embraces any form of instruction wheresoever and not necessarily in educational institutions. It has been so authored in Para 21.84 of the Modern Law of Copyright & Designs Fourth Edition by Laddie, Prescott and Vitoria, also. However as distinct therefrom Section 52(1)(h) of pre 2012 amendment corresponding to Section 52(1)(i) of post amendment used the words ‘in the course of instruction’ ‘by a teacher or a pupil’ only. Thus while publication in a collection mainly composed of non-copyright work of two short passages of copyrighted work was earlier permitted only if intended for use of educational institutions, it is now permitted for any instructional use, not necessarily in educational institutions.

57. The use of the word ‘publication’ in Section 52(1)(h) as distinct from the word ‘reproduction’ in Section 52(1)(i) further brings out the difference between the two words. While the word ‘publication’ used in Section 52(1)(h) connotes making available to the public ‘for the first time’ or by

way of 'further editions' or 're-print' i.e. the activity in which plaintiffs are involved, the word 'reproduction' used in Section 52(1)(i) entails 'copying' for limited use i.e. for an individual or for a class of students being taught together by a teacher.

58. What is however contended is that the act of reproduction of copyrighted work permitted under Section 52(1)(i) has to be "in the course of instruction" i.e. in the course of teachers of the defendant no.2 University lecturing the pupils and does not cover, the defendant no.2 University in the syllabus prescribed by it prescribing portions of the copyrighted work as suggested reading, making photocopies thereof and making the same available to the pupils i.e. the students. It is contended that the use of the word "instruction" has to be limited to imparting of instructions in the classrooms or in the tutorials and during which the teachers can teach by doing in relation to copyrighted work actions which otherwise are the exclusive right of the owner of the copyright.

59. The word "instruction" used in Section 52(1)(i) as also in Section 52(1)(h) (though not applicable) is not defined in the Act, though the word "lecture" has been defined in Section 2(n) as including address, speech and

sermon. The meaning assigned by the counsel for the plaintiffs to the word “instruction” is the same as inclusive definition of lecture. Had the intention of the legislature while incorporating Section 52(1)(i) been to constitute reproduction of any work by a teacher or a pupil in the course of lecture, the legislature would have in Section 52(1)(i) used the word “lecture” which has been defined in the Act. The word “instruction” thus has to necessarily mean something other than lecture.

60. The word ‘instruction’, as commonly understood and defined in dictionaries, means ‘something that someone tells you to do’ or ‘a direction or order’ or ‘detailed information about how something should be done or operated’ or ‘the action or process of teaching’. Thus the word ‘instruction’ in the context of a teacher would mean something which a teacher tells the student to do in the course of teaching or detailed information which a teacher gives to a student or pupil to acquire knowledge of what the student or pupil has approached the teacher to learn. A Division Bench of the High Court of Karnataka in ***B.K. Raghu Vs. The Karnataka Secondary Education Examination Board*** ILR 2009 Karnataka 206 also equated education to instruction or training by which people, (generally young), learn to develop and use their mental, moral and physical powers. It was

held that 'formal education' is instruction given in schools and colleges—In this type of education, the people in charge of a school or college decide what to teach and learners then study those things under the direction of teachers. A Division Bench of the High Court of Bombay in ***Bombay Municipal Corporation Vs. Ramachandra Laxman Belosay*** AIR 1960 Bom 58 held that the words “educational objects” in Section 63(b) of the Bombay Municipal Corporation Act, 1888 and the word “instruction” used in clause (k) are words of very wide import. Education was held as meaning “totality of information and qualities acquired through instruction and training which further the development of an individual physically, mentally and bodily”. The word “instruction” was held to mean, to furnish knowledge or information, to train in knowledge or learning, to teach, to educate.

61. Moreover, the use of the word “instruction” preceded with the words “in the course of” would mean in the course of instruction being imparted and received.

62. The crucial question for adjudication is, when does the imparting of instruction begin and when does it end. Whether in the classroom or tutorials

only, as suggested by the counsel for the plaintiff or it begins prior to the classroom and ends much after the classroom interface between the teacher and pupil has ended, as contended by the counsels for the defendants.

63. That takes me to the meaning of the phrase “in the course of”. Such words/phrase are found to have been often used in legislations (i) in relation to trade and commerce viz. “in the course of trade and commerce” or “in course of manufacture” or “in the course of import or export”, (ii) in legislations relating to employment viz. “in the course of employment”, and (iii) in legislations relating to taxation viz. “in the course of the year”, and my research shows, have been interpreted widely, as including within their ambit actions not just constituting ‘trade and commerce’ or ‘employment’ or ‘year’ but also what are preceding and following the actual acts.

64. Supreme court, in *State of Travancore-Cochin Vs. Shanmugha Vilas Cashewnut Factory Quilon* AIR 1953 SC 333, while construing the words “in the course of the import of goods into, or export of the goods out of, the territory of India” used in Article 286(1)(b) of the Constitution of India held that though the words “in the course of” are not to be read as synonymous with the words “for the purpose of” but still the purchase made by the

exporter to implement his agreement for sale with foreign buyer is to be regarded as having taken place in the course of export because the purchase by the exporter is an activity so closely integrated with the act of export as to constitute a part of the export process itself and as having taken place “in the course of” the export. It was also held that the earlier sale or purchase were remote and not be regarded as integral part of the process of the export in the same sense as the last purchase by the exporter. It was held that the exports can be occasioned only if the exporters have the goods to export; the exporters are not necessarily the producers or manufacturers and in great many cases they have to procure the goods to implement the foreign orders; the overseas orders in such cases immediately necessitate the purchase of the goods and eventually occasion the export; the three activities were held to be so intimately and closely connected, like cause and effect, with the actual export that they may well be regarded as integral parts of the process of export itself. It was yet further held that one cannot overlook or ignore these well known preliminary but essential activities of the export merchants which necessarily precede and lead up to and indeed occasion or eventually make possible the ultimate physical movement of the goods and to hold that these purchases are independent local purchases totally distinct from the

export trade will be to unduly narrow down the wide meaning of the flexible phrase “in the course of”.

65. It would thus be seen that for construing the phrase “in the course of”, the test of “an integral part of continuous flow” and of “commercial sense” was evolved. I must however mention that by the Constitution Sixth Amendment Act, 1956, Parliament was given power to formulate principles for determining when a sale or purchase of goods takes place. Pursuant thereto, a Constitution Bench of the Supreme Court in *Md. Serajuddin Vs. The State of Orissa* (1975) 2 SCC 47 though also held that the expression “in the course of” implies “not only a period of time during which the movement is in progress but postulates a connected relation”, but on interpretation of Section 5 of the Central Sales Tax Act, 1956 held the sale to the exporter to be not exempt from sales tax under Section 5 of the Central Sales Tax Act, 1956. It would thus be seen that the ratio of *Shanmugha Vilas Cashewnut Factory Quilon* supra remains unaffected.

66. In *Mackinnon Machenzie and Co. (P) Ltd. Vs. Ibrahim Mahmmed Issak* (1969) 2 SCC 607, Supreme Court while construing the words “in the course of the employment” in Section 3 of the Workmen’s Compensation

Act, 1923 held that the words “in the course of employment” mean “in the course of the work which the workman is employed to do and which is incidental to it”. It was further held that the words “arising out of employment” are understood to mean that “during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered”. It was yet further held that there must be a causal relationship between the accident and the employment.

67. It would thus be seen that the test of “incidental”, “causal relationship” and “otherwise would not have occasioned” was evolved to determine what is “in the course of”.

68. Again, in *Regional Director, E.S.I. Corporation Vs. Francis De Costa* (1996) 6 SCC 1, in the context of the words “in the course of his employment” in Section 2(8) of the Employees’ State Insurance Act, 1948, the dictionary meaning of “in the course of” was explained as “during (in the course of time, as time goes by), while doing”.

69. In *Commissioner of Income Tax, New Delhi Vs. M/s. East West Import and Export (P) Ltd.* (1989) 1 SCC 760, in the context of the expression “in the course of such previous year” in Explanation to Section 23A of the Income Tax Act, 1922 it was held that the word “course” ordinarily conveys the meaning of a continuous progress from one point to the next in time and space and conveys the idea of a period of time, duration and not a fixed point of time. The words “in the course of such previous year” were thus held to refer to the period commencing with the beginning of the previous year and terminating with the end of the previous year.

70. A Five Judges Bench of the High Court of Orissa in *Registrar of the Orissa High Court Vs. Baradakanta Misra* AIR 1973 Ori 244 in the context of the words “due course of justice” in Section 13 of the Contempt of Courts Act, 1971 held that one of the meanings of the word “course” is “the path in which anything moves”. The words “course of justice” were therefore held to mean the path in which justice moves. It would thus be seen that the test of “the path in which anything moves” was applied to the interpretation of the words “in the course of”;

71. The phrase/words “in the course of” are thus found to have a definite connotation and meaning and it has to follow that when the legislature used this phrase/words, it intended them to have the same meaning. The rule of construction approved by the Supreme Court in *Banarsi Devi Vs. Income Tax Officer* AIR 1964 SC 1742, is that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or a same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it. Similarly in *F.S. Gandhi Vs. Commissioner of Wealth Tax* (1990) 3 SCC 624 it was held that where the Parliament has repeated the same language it must be assumed that the Parliament was aware of construction placed by the courts on those words and in repeating those words Parliament must be taken to have used the words to bear the meaning which has been put upon them by the courts.

72. Applying the tests as aforesaid laid down by the Courts of (i) integral part of continuous flow; (ii) connected relation; (iii) incidental; (iv) causal relationship; (v) during (in the course of time, as time goes by); (vi) while doing; (vii) continuous progress from one point to the next in time and space; and, (viii) in the path in which anything moves, it has to be held that

the words “in the course of instruction” within the meaning of Section 52(1)(i) supra 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 personal interface between teacher and pupil but is a process commencing from the teacher readying herself/himself for imparting instruction, setting syllabus, prescribing text books, readings and ensuring, whether by interface in classroom/tutorials or otherwise by holding tests from time to time or clarifying doubts of students, that the pupil stands instructed in what he/she has approached the teacher to learn. Similarly the words “in the course of instruction”, even if the word “instruction” have to be given the same meaning as ‘lecture’, have to 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 and so that the teachers can reproduce the work as part of the question and the pupils can answer the questions by reproducing the work, in an examination. Resultantly, reproduction of any copyrighted work by the teacher for the purpose of imparting instruction to the pupil as

prescribed in the syllabus during the academic year would be within the meaning of Section 52 (1)(i) of the Act.

73. The matter can be looked at from another angle as well. Though I have held Section 52(1)(a) to be not applicable to the action of the defendant no.2 University of making photocopies of copyrighted works but the issuance by the defendant no.2 University of the books purchased by it and kept in its library to the students and reproduction thereof by the students for the purposes of their private or personal use, whether by way of photocopying or by way of copying the same by way of hand would indeed make the action of the student a fair dealing therewith and not constitute infringement of copyright. The counsel for the plaintiffs also on enquiry did not argue so. I have wondered that if the action of each of the students of having the book issued from the library of defendant No.2 University and copying pages thereof, whether by hand or by photocopy, is not infringement, whether the action of the defendant no.2 University impugned in this suit, guided by the reason of limited number of each book available in its library, the limited number of days of the academic session, large number of students requiring the said book, the fear of the costly precious books being damaged on being subjected to repeated photocopying, can be said to

be infringement; particularly when the result/effect of both actions is the same.

74. The answer, according to me, has to be in the negative.

75. It cannot be lost sight of that Section 63 of the Copyright Act constitutes infringement of copyright an offence punishable with imprisonment for a term not less than six months and extendable to three years “and” with fine. When an action, if onerously done is not an offence, it cannot become an offence when, owing to advancement in technology doing thereof has been simplified. That is what has happened in the present case. In the times when I was studying law, the facility available of photocopying was limited, time consuming and costly. The students then, used to take turns to sit in the library and copy by hand pages after pages of chapters in the books suggested for reading and subsequently either make carbon copies thereof or having the same photocopied. The photocopying machines then in vogue did not permit photocopying of voluminous books without dismembering the same.

76. However with the advancement of technology the voluminous books also can be photocopied and at a very low cost. Thus the students are now

not required to spend day after day sitting in the library and copying pages after pages of the relevant chapter of the syllabus books. When the effect of the action is the same, the difference in the mode of action cannot make a difference so as to make one an offence.

77. The Court of Claims of United States as far back as in *The Williams & Wilkins Company Vs. The United States* 487 F.2d 1345 (Ct.Cl. 1973) was concerned with an action for infringement of copyright by a medical publisher against the Department of Health, Education and Welfare through the National Institutes of Health and the National Library of Medicine. The National Library of Medicine was alleged to have infringed the copyright by making photocopies of the articles published in the medical journals and distributing the same amongst students, physicians and scientists engaged in medical research. It was held (i) that the photocopying process did not even amount to printing or reprinting in the dictionary sense; (ii) if the requester himself made a photocopy of the article for his own use on a machine made available by the library, he might conceivably be "copying" but he would not be "printing" or "reprinting" ; (iii) the library is in the same position when responding to the demands of individual researchers acting separately; (iv) there is no "publication" by the library, a concept which invokes general

distribution, or at least a supplying of the material to a fairly large group; (v) it is common for courts to be given photocopies of recent decisions with the publishing company's headnotes and arrangement and sometimes its annotations; (vi) it cannot be believed that a Judge who makes and gives to a colleague a photocopy of a law review article, in one of the smaller or less available journals, which bears directly on a problem both Judges are then considering in a case before them, is infringing the copyright; (vii) library was not attempting to profit or gain financially by the photocopying; (viii) the medical researchers who had asked the library for the photocopies and the scientific researchers and practitioners who need the articles for personal use in their scientific work and have no purpose to re-duplicate them for sale or other general distribution; (ix) the copied articles were scientific studies useful to the requesters in their work; (x) on both sides - library and requester - scientific progress untainted by any commercial gain from the reproduction was the hallmark of the whole enterprise of duplication ; (xi) the act was to gain easier access to the material for study and research; (xii) care had been taken not to have excessive copying from one issue or one volume of the periodical; (xiii) the recipients were not using the library's photocopying process to sell the copies or distribute them broadly; (xiv) the

library was responding only to requests from its own personnel and the entire photo-duplication system is strictly "in-house" - in the same way that a court's library may supply a Judge of that court with a copy of a law journal article or a reported decision; (xv) medical science would be seriously hurt if such library photocopying were stopped; (xvi) without such photocopying constituting infringement, the libraries could not be compelled to take licence from the publisher; and, (xvii) photocopying falls within fair use. It was accordingly concluded that there was no infringement of copyright. It was further held that "use is not the same as infringement and use short of infringement is to be encouraged". This decision of the Court of Claims was subsequently affirmed by the US Supreme Court in *Williams & Wilkins Company Vs. US* 420 U.S. 376.

78. I may also mention another advancement. Today, nearly all students of the defendant no.2 University would be carrying cell phones and most of the cell phones have a camera inbuilt which enables a student to, instead of taking notes from the books in the library, click photographs of each page of the portions of the book required to be studied by him and to thereafter by connecting the phone to the printer take print of the said photographs or to read directly from the cell phone or by connecting the same to a larger

screen. The same would again qualify as fair use and which cannot be stopped.

79. The German Federal Supreme Court in *Re. the Supply of Photocopies of Newspaper Articles by Public Library* [2000] E.C.C. 237 held that in a modern technologically highly developed nation like Germany, an extensive fast functioning and economic information exchange was vital; that is why the libraries were given the freedom to operate and the reproduction rights of authors were restricted in favour of freedom of information; that it was sufficient to escape liability for copyright infringement if the customer of the library could claim the benefit of the exemption which allowed the copying for personal use, of articles published in a periodical; whether or not the library charges for its service is immaterial; there may be an act of 'circulation' where copies are offered which had not yet been made at the time of the 'circulation' but not when copies are made; the same does not constitute commercialisation of copies of protected works.

80. Copyright, specially in literary works, is thus not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to

increase and not to impede the harvest of knowledge. It is intended to motivate the creative activity of authors and inventors in order to benefit the public. For this reason only, Section 14(a)(ii) as aforesaid, applies the principle of 'exhaustion' to literary works and which, this court in *Warner Bros. Entertainment Inc. Vs. Mr. Santosh V.G.* MANU/DE/0406/2009 has held, to be not applicable to copyright in an artistic work or in a sound recording or in a cinematographic film. Once it is found that the doctrine of exhaustion applies to literary work as the works with which we are concerned are, it has but to be held that it is permissible for the defendant No.2 University to on purchasing book(s) and stocking the same in its library, issue the same to different students each day or even several times in a day. It is not the case of the plaintiffs that the said students once have so got the books issued would not be entitled to, instead of laboriously copying the contents of the book or taking notes therefrom, photocopy the relevant pages thereof, so that they do not need the book again.

81. I thus conclude that the action of the defendant no.2 University of making a master photocopy of the relevant portions (prescribed in syllabus) of the books of the plaintiffs purchased by the defendant no.2 University and kept in its library and making further photocopies out of the said master

copy and distributing the same to the students does not constitute infringement of copyright in the said books under the Copyright Act.

82. The next question is, whether the action of the defendant no.2 University of supplying the master copy to the defendant no.1, granting licence to the defendant no.1 to install photocopiers in the premises of the defendant no.2 University, allowing the defendant no.1 to supply photocopies made of the said master copy to the students, permitting the defendant no.1 to charge therefor and also requiring the defendant no.1 to photocopy up to 3000 pages per month free of cost for the defendant no.2 University and whether the action of the defendant no.1 of preparation of such course packs and supplying the same to the students for charge, constitutes 'publication' within the meaning of Section 52(1)(h) or would tantamount to infringement by the defendant no.1 or the defendant no.2 University of the copyright of in the said books.

83. In my opinion, it would not.

84. What the defendant no.2 University is doing is not different from what is being done in the Bar Association library in the premises of this Court. With the advent of photocopying, the advocates of this Court,

instead of carrying books from their residences / offices to this Court for citing judgments therefrom during the course of arguments and instead of giving in advance the list of such books to the Restorer of this Court and the Restorer of this Court also taking out the court's copies of the same books for the Judges to read, and all of which was cumbersome and time consuming, started having the photocopies of the relevant judgments made from the books in the Bar Association Library of this Court. Initially the said photocopying was got done by having the book issued from the library and carrying the same to the photocopier who had, for the convenience of the advocates, been granted a licence to operate from the premises of this Court. Subsequently, for expediency and to avoid the books being taken out of the library, the Bar Association library itself allowed the photocopier to install his machine within the library premises and any advocate could get the photocopy done by having the relevant judgment photocopied within the Bar Association library by paying the cost of photocopy as is fixed by the Bar Association.

85. The defendant no.2 University also could have possibly devised the same arrangement as has been followed in the Bar Association library of this Court and allowed the defendant no.1 to install its photocopying

machine within the defendant no.2 University's library for the facility of the students. However for whatsoever reason the respondent no.2 University has deemed fit, it is continuing with the practice as was earlier prevalent in this Court.

86. In my view, there is no difference in the two situations i.e. whether the photocopying machine is installed within the library or is installed outside the library. In my view it also does not make any difference whether the respondent no.2 University itself purchases the photocopy machine and / or allows the students to photocopy themselves or employs a person for doing photocopy. In this respect, I may again note that in our country, with abundance of labour force, the acts such as of photocopying which are done by those desirous thereof themselves in other countries are done by a person employed therefor. In countries with not so much labour force, photocopiers are found to have been installed in libraries for the benefit of the patrons of the library to themselves photocopy whatsoever passages of the publications in the library they are desirous of photocopying for their personal use. Once such a action is held to be not offending any provisions of the Copyright Act, merely because the photocopying is done not by the person desirous thereof himself but with the assistance of another human

being, would not make the act offending. It matters not whether such person is an employee of the defendant no.2 University or the defendant no.2 University avails the services of a contractor. The position of the defendant no.1 in the present case is found to be that of a contractor to whom the defendant no.2 University has outsourced its work of providing photocopying service for its students. For this reason, it matters not whether the photocopying machine is allowed by the defendant no.2 University to be kept within the library or at some other place outside the library.

87. It is not the case of the plaintiffs that the defendant no.2 University has permitted the defendant no.1 to or that the defendant no.1 is photocopying the entire books, binding the same, offering or displaying the same for sale to whosoever may be desirous of purchasing the same. The case of the plaintiffs before us is only of preparation of course packs i.e. compilations of photocopied portions of different books prescribed by the defendant no.2 University as suggested reading in its syllabus. That, in my view, by no stretch of imagination, can make the defendant no.1 as competitor of the plaintiffs. Imparting of education by the defendant no.2 University is heavily subsidized with the students still being charged tuition

fee only of Rs.400 to 1,200/- per month. The students can never be expected to buy all the books, different portions whereof are prescribed as suggested reading and can never be said to be the potential customers of the plaintiffs. If the facility of photocopying were to be not available, they would instead of sitting in the comforts of their respective homes and reading from the photocopies would be spending long hours in the library and making notes thereof. When modern technology is available for comfort, it would be unfair to say that the students should not avail thereof and continue to study as in ancient era. No law can be interpreted so as to result in any regression of the evolvement of the human being for the better.

88. Just like the cost to the respondent no.2 University of employing a photocopier or a contractor for photocopying would have to be necessarily built in the cost of photocopy, so also the cost incurred by the defendant no.1 in employing manpower and towards electricity would be built in cost of photocopying. My enquiries reveal that the photocopier granted licence in this Court premises is also presently charging 75 paise per page. Comparing the same with the rate which the respondent no.2 University has permitted the defendant no.1 to charge, does not show that the defendant no.2 University has permitted the defendant no.1 to function or that the defendant

no.1 is functioning as a competitor to the plaintiffs. It was only if the defendants no.1&2 were said to be charging for a reproduction of the book of the plaintiffs at a price competing with the price fixed by the plaintiffs for the books, could it have been said that the defendant no.1 is functioning commercially.

89. All that is happening in the present case is that instead of the defendant No.2 University issuing the book which may be sought after by a large number of students, to each one of them individually for limited period or limited hours and enabling each student to photocopy the passages or the contents thereof required by him “in the course of instruction” and thereby exposing the book to damage, the defendant No.2 University itself is supplying the said photocopies. It cannot be lost sight of that we are a country with a bulging population and where the pressure on all public resources and facilities is far beyond that in any other country or jurisdiction. While it may be possible for a student in a class of say 10 or 20 students to have the book issued from the library for a month and to laboriously take notes therefrom, the same is unworkable where the number of students run into hundreds if not thousands. According to me, what is permissible for a small number of students cannot be viewed differently,

merely because the number of students is larger. Merely because instead of say 10 or 20 copies being made by students individually or by the librarian employed by the University, 100 or 1000 copies are being made, the same would not convert, what was not an infringement into an infringement.

90. I thus conclude that the engagement as aforesaid by the defendant No.2 University of defendant No.1 does not convert the action of defendant No.2 University as held hereinabove to be not amounting to infringement of copyright in books, to infringement.

91. I next take up the aspect of the international covenants.

92. Articles 9 and 10 of the Berne Convention supra to which reference was made are as under:

“Article 9

Right of Reproduction:

1. Generally; 2. Possible exceptions; 3. Sound and visual recordings

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) **It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.**

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Article 10

Certain Free Uses of Works:

1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) **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.**

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.”

93. Clauses 9.6 to 9.13 of the Code to the Berne Convention published by the World Intellectual Property Organization in relation to Article 9(2) of the Berne Convention are as under:

“Article 9, paragraph (2)

Exceptions

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

9.6. This provision gives to member countries the power to cut down this exclusive right of reproduction and permit works to be reproduced

"in certain special cases". But the freedom allowed them is not total. The Convention adds two conditions in a formula, the drafting of which, in Stockholm (1967), led to prolonged debate, and the interpretation of which produces much difference of opinion. It consists of two phrases which apply cumulatively: the reproduction must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author.

9.7. If the contemplated reproduction would be such as to conflict with a normal exploitation of the work it is not permitted at all. Novels, schoolbooks, etc., are normally exploited by being printed and sold to the public. This Article does not permit member countries to allow this e.g., under compulsory licences, even if payment is made to the copyright owner.

9.8. If the first condition is met (the reproduction does not conflict with the normal exploitation of the work) one must look and see whether the second is satisfied. Note that it is not a question of prejudice or no: all copying is damaging in some degree; a single photocopy may mean one copy of the journal remaining unsold and, if the author had a share in the proceeds of publication he lost it. But was this prejudice unreasonable? Here, scarcely. It might be otherwise if a monograph, printed in limited numbers, were copied by a large firm and the copies distributed in their thousands to its correspondents throughout the world. Another example is that of a lecturer who, to support his theme, photocopies a short article from a specialist journal and reads it to his audience; clearly this scarcely prejudices the circulation of the review. It would be different if he had run off a large number of copies and handed them out, for this might seriously cut in on its sales. In cases where there would be serious loss of profit for the copyright owner, the law should provide him with some compensation (a system of compulsory licensing with equitable remuneration).

9.9. Most countries allow a few photocopies to be made without payment especially for personal or scientific use, but expressions of this sort leave a lot of latitude to legislators and the courts.

9.10. Laws, for example the Tunis Model Law, often allow the reproduction of a work for "the user's personal and private use". True, this expression is interpreted in different ways, but in principle it does not cover any collective use and it assumes that the reproduction is not done for profit. The usual example is that of the student who, for study or research purposes, copies a text. Manuscript copies have little impact;

but with the arrival of new copying techniques the situation changes. It is a matter not only of photocopiers but also of tape-recorders.

9.11. It is a little more than child's play to make high quality recordings of both sound and vision, either from discs or cassettes (re-recording) or off the air (television as well as radio). The idea of a limitation to private use becomes less effective when copies can be made privately in large numbers. If practical considerations do not offer copyright owners and their successors in title a chance to exercise their exclusive right of reproduction, it has been suggested that a global compensation might be provided for them, and that the money might be raised by imposing a levy on the material (tape, etc.) on which the sounds and images are fixed, as well as on the apparatus used for fixing. (A working group meeting in Geneva in February 1977 examined the legal problems arising from the use of videograms to make video-copies.)

9.12. **Similar solutions (including the creation of collective mechanisms) are suggested in the field of reprography, where the problem is particularly acute because of the number of different users: libraries, archives, documentation centres, public research institutes whether established for profit or not, schools, government departments, etc. Reprography certainly makes a large contribution to the diffusion of knowledge; but it is no less certain that copying on a large scale seriously damages the interests of the copyright owners. These interests must therefore be reconciled with the needs of users. It rests with each country to make appropriate measures best adapted to its educational, cultural and social and economic development (see the conclusions of the sub-committee on reprographic reproduction which met in Washington in June 1975).**

9.13. **The legislator's task is not an easy one. This paragraph, with its two conditions, provides him with certain guidelines."**

(emphasis added)

94. Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights is as under:

"Article 13

Limitations and Exceptions

Members shall 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 interest of the right holder.”

95. It would thus be seen that under the Berne Convention also, the only binding obligation on the privy countries is to in their respective legislations i) not permit 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.

96. India, under the international covenants aforesaid, though has the freedom to legislate as to what extent utilization of copyrighted 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”.

97. The international covenants aforesaid thus left it to the wisdom of the legislators of the member / privy countries to decide what is “justified for the purpose” and what would “unreasonably prejudice the legitimate interest of the author”. Our legislators, while carrying out the amendments to the Copyright Act are deemed to have kept the said international covenants in mind. Parliament / legislators have permitted reproduction of any work by a teacher or a pupil in the course of instructions. I have already hereinabove, in accordance with the meaning which has been assigned by the Courts to the words / phrase “in the course of” since prior to the use thereof in Section 52(1)(i) and in accordance with the meaning of the word “instruction”, interpreted Section 52(1)(i). The legislators have found reproduction of the copyrighted work in the course of instruction to be justified for the purpose of teaching and to be not unreasonably prejudicing the legitimate interest of the author. 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 which under our Constitution and under the international covenants aforesaid was entrusted to while making law in

relation to copyright take a call on what is justified for the purpose of teaching and what will unreasonably prejudice the legitimate interest of the author has not imposed any such limitation, this Court cannot impose the same.

98. In *Smita Subhash Sawant Vs. Jagdeeshwari Jagdish Amin* (2015) 12 SCC 169 it was held that Courts cannot read any words which are not mentioned in the section. Recently also in *Narayan Vs. Babasaheb* (2016) 6 SCC 725 it was held that inconvenience and hardship to a person will not be decisive factors while interpreting a provision and that when a bare reading of the provision makes it very clear and gives it a meaning, it has to be interpreted in the same sense as *latin maxim dulo lex sed lex* which means law is hard but it is law and there cannot be any departure from words of law.

99. In accordance with the aforesaid international covenants, the legislators of some other member / privy countries in the context of their respective countries have worded the exceptions differently and on an interpretation of which legislation, the Courts of those countries have adjudicated and which judgments have been cited by the counsels. I am

however of the opinion that the said judgments in the context of different legislations on the basis of perception by the legislators thereof of the purpose of teaching and unreasonable prejudice to the legitimate interest of the author cannot form the bedrock for this Court to interpret the Copyright Act of this country.

100. I am therefore not proceeding to discuss the said judgments. The reference hereinabove by me to some foreign judgments is only to demonstrate the diversity.

101. I therefore conclude the actions of the defendants to be not amounting to infringement of copyright of the plaintiffs.

102. Once that is so, no trial is required in the suit.

103. The suit is accordingly dismissed. However no costs.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 16, 2016

bs/bharti/pp/gsr

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