

Copyright Law of India and the Academic Community†

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Copyright plays a crucial role in academic institutions. Although, copyright protection has been in existence in India for more than 150 years, copyright issues in academic institutions have not received enough attention. This paper attempts to look at the issues in the background of the philosophical justification for copyright protection. After a bird's eye view of the basics of copyright, the paper looks at the traditional issues relating to scope, ownership and use of copyrighted works in educational institutions, in the light of case laws. Then the possible issues that Indian educational institutions may have to face in the context of the emergence of digital technologies and widespread use of information technology are examined. The paper concludes with certain suggestions for the consideration of the educational institutions.

Keywords: Copyright law, Moral rights, Economic rights, Legal rights, Exclusive rights, Copyright ownership, Copyright regime, Digital technologies, Educational institutions

India has one of the oldest academic traditions with formal education finding a place in its ancient history. The universities of Taksila and Nalanda were great centres of learning in the ancient world,¹ brimming with students and teachers from different parts of the world, not to say about the great *Gurukul* tradition in the hoary past. However, those were the days when learning was considered as gift of God, freely received and freely given. Over the centuries, approach to education and learning changed. Old traditions gave way to new ones. New economic models

and institutional structures emerged. Western style universities and schools came into existence². Approach to products of mind that formed the content of educational institutions also got changed over the centuries. Concept of copyright in literary works found a place in India by the nineteenth century.

India had its first copyright law enacted on 18th December 1847 much earlier than many other countries. It is interesting to read the title of that legislation: "An Act for the encouragement of learning in the Territories subject to the Gov-

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ernment of the East India Company, by defining and providing for the enforcement of the right called Copyright therein³”. The scope of that Act covered books only⁴ and not other kinds of creative expressions. It is, however, remarkable that the Act provided for compulsory licence to publish a book, which the original publisher had refused to republish so that books in demand were not withheld from the public.⁵ Although such legislation existed, the Bombay High Court in a judgement towards the end of the 19th century held the British Copyright Act, 1842 as the one applicable to India⁶. In 1911 “An Act to amend and the law relating to copyright” was enacted by the British Parliament. That Act had extended application to all the British dominions including India. It, however, had a provision enabling the legislatures of the dominions to alter or modify the provisions of the Act in its application to that dominion. Accordingly, the Government of India enacted the Copyright Act, 1914. That Act remained in force till 1958 when the new Copyright Act, 1957 passed by the parliament of independent India was brought into force.⁷ An interesting feature of the British phase of copyright protection in the country is that while in Britain, the universities of Cambridge and Oxford, the four universities in Scotland⁸, and the several colleges of Eton, Westminster and Winchester as well as Trinity College, Dublin, had the right “to hold in perpetuity their copyright in books given or bequeathed to them for the advancement of useful learning and other purposes of education,”⁹ universities in India such as Kolkata, Bombay and Madras did

not have such a right. The current law of copyright in India is the 1957 Act, but it has been amended a number of times, last being in 1999, to keep it abreast with the socio-economic and technological developments

Although India has been providing copyright protection since the nineteenth century, copyright issues had not exercised the academic community in a scale commensurate with their role in academic activities. There could be various reasons for the same. First, the traditional Indian attitude to knowledge dissemination and cultural efforts has been non-commercial. Secondly, most considered, the income derivable from copyright is not very significant and, therefore, a lax attitude to the enforcement of the copyrights existed. Thirdly, educational institutions did not look upon intellectual property effort as a wealth creation activity. In fact, copyrightable works such as course material or textbooks were not looked upon as ‘commodities’ in the market place but as instruments for achieving the primary objective of such institutions, that is, imparting of education. However, with the development of new technologies in storage and dissemination of information the situation has changed and now academic community cannot be a silent spectator. The issues need to be addressed properly. In order to get a clear picture of the problems, we may first look at the basics of copyright protection, then the traditional copyright issues in education and finally at the new emerging challenges.

Basics of Copyright

The most important argument advanced for copyright protection is the need to

shield the author's personality from distortions and also to ensure economic returns to him for his creative efforts.

The concept of protection of author's personality emerges from the view that every creative work is an extension of the self of the creator. This protection involves right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the work, which would be prejudicial to the honour or reputation of the author¹⁰. These rights are generally known as moral rights (*droit moral*). In some countries the right to publish the work is also considered as a moral right.

While moral rights may ensure creative satisfaction for an author, they do not guarantee economic gains for him. It is argued that the possibility of fair economic returns from the work is a necessary incentive for creation of original works. After all, an author spends time and energy in creating a new work and like any other individual he also has to earn his daily bread by the sweat of his brow unless he was born with a silver spoon in his mouth. Even if he has other means of livelihood, he still has a right to economic returns for his effort. Just as a manual labourer gets paid by the beneficiary (exploiter) of his labour, an author has a basic human right to get paid for the labour, skill and energy that he has spent over his work by the user (exploiter) of that work¹¹. This is the traditional economic rationale of copyright law. It is natural justice that the product of the labour, skill and capital of one man must not be appropriated by another.¹² It

should be possible for an author to earn from his works if there is a popular demand for them. In the absence of any regulation, any unscrupulous enterpriser or carpetbagger may publish the work of an author and make money out of it without giving any penny to the author. Therefore, copyright provides exclusive rights to the author to reproduce or adapt or communicate to the public his work.¹³ These rights are referred to as economic rights as they enable an author to make pecuniary gains by controlling those rights, i.e., he can negotiate financial returns for licensing the use or for assignment of any of those rights. This brings copyright to the stable of property rights, as one kind of intellectual property rights.

There are major differences between intellectual property rights (IPR) and other property rights. IPR are rights over intangible property or property incorporeal. Physical property gets exhausted when consumed whereas the use of intellectual property does not exhaust the same; rather it enhances the value of the property. Consequently intellectual property is one, which can be concomitantly used by many.

There is a public interest angle to be taken care of while providing legal rights to authors in the use or exploitation of their creative efforts. This is because these rights are in essence a right to control access to cultural, educational and scientific material. Control over these is, in effect, control over the intellectual life of the community. It is control over national, if not universal, cultural patrimony. While in the realm of physics it may be a fact that the quantum of matter

plus energy is constant and there can be no addition, in the intellectual property domain there is always new creations and additions to the existing ones. This addition occurs not in a vacuum but as a result of utilization of existing substance and bringing out advancement on the same. Total prohibition of the use of the new material by the society will adversely affect the intellectual growth of the society, as new creative efforts will be restrained. Therefore, this tension between individual author's claims (both moral and economic) to control his creative effort and the society's interest in having access to the fruits of creativity in the larger interest of humanity emerges as the principle of balance of rights in copyright. Every copyright law has to keep a balance between the author's rights based on the need for protecting his personality and for ensuring fair economic returns to him for his creative efforts and the society's interest in having access to the work in the interest of intellectual growth.

This principle of the balancing of the exclusive right of the author or publisher in the work with the public interest in the free dissemination of all works got enshrined in the British legal tradition with the historic judgement of the House of Lords in the case of *Donaldson v Beckett* in 1774¹⁴. Since then, common law countries, including India, have generally adhered to this principle of balance between exclusive rights of owners and the interests of society at large.

This basic principle of copyright finds its *raison d'être* in the Universal Declaration of Human Rights too. Article 27 of this Declaration states:

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Since its beginnings in the 15th century as a stationer's right, the nature and philosophy of copyright have undergone substantial changes. The economic rationale of ensuring returns for investment has over the course of time overshadowed the author-creativity justification for the existence of copyright. Copyright is now perceived more as an industrial property than as an author's right. But the new perspective also recognises the 'public good' aspects which necessitates a balance between controlling the use of works and providing reasonable access to them, if not for any other reason than that "it is impossible to exclude free riders, except at a cost."¹⁵

While the author's interests are taken care of by the provisions relating to the exclusive rights, both moral and economic, the societal interest is protected in most copyright laws through limitations and exceptions to these rights. These are generally of three categories, viz., limited duration of protection, provision for compulsory licences and allowing certain uses without specific authorization by the owner of copyrights, known as fair use provisions in copyright parlance.

Copyright is not a right in perpetuity but is limited in time. The period of pro-

tection can vary from country to country. However, as per the Berne Convention for the Protection of Literary and Artistic Works, the minimum term of protection, which every country is obliged to provide, is life term of the author plus fifty years.¹⁶ In India this period is life term of the author plus sixty years.¹⁷ After expiry of this period the work comes into what is referred to as 'public domain', i.e., when any person can exploit the work without either an authorization from the right owner or any mandatory payment to such owner. In other words, it becomes a common heritage of the society.

The other means used for ensuring the balance of rights principle is that of having limitations on the exercise of the exclusive rights. These may be through provisions relating to compulsory licences in certain circumstances, and by totally exempting certain uses from the purview of copyright. For example, Section 31 of the Copyright Act provides that the Copyright Board can grant licence on application for publication in certain cases, such as works withheld from the public, and subject to certain conditions.¹⁸ Payment of a specified royalty is normally prescribed as a condition in these cases. While the copyright owner has exclusive right over exploitation of a work, copyright laws permit certain uses without any specific authorization of the owner and at no cost. These are referred to as fair use provisions.¹⁹ The Berne Convention prescribes a three-step test for such exceptions²⁰. It stipulates that such permissible reproduction should be only in certain special cases, that it should not conflict with normal exploitation of the work and

that it should not unreasonably prejudice the legitimate interests of the author. The Convention also indicates quotations and illustrations for teaching as permissible uses.²¹ Using certain copyright material for reporting of current events is also considered as a fair use.²² The Indian law specifies such permissible uses in Section 52 of the Copyright Act. These provisions enable legitimate use of new copyrighted works for the educational, scientific, and cultural advancement of the society which is the implied objective of copyright law as could be derived from the title of the first copyright law of this country.

Copyright law is built upon a number of concepts. The most fundamental of them is that copyright applies only to expressions and not to ideas. There is no copyright in ideas or scientific principles or historical facts. "An idea, principle, theme or subject matter or historical or legendary facts being common property cannot be the subject-matter of copyright of a particular person."²³ Any person can pick up an idea, develop it in his own manner and express it in his own unique style. Paul Goldstein puts the rationale for this in the following words:

Copyright law excludes protection for ideas because ideas, particularly good ideas, are relatively few, are rarely original and are the necessary building blocks for all literary, musical and artistic expressions. If copyright is to promote a wide variety of expression, authors, composers and artists must be free to draw on the pool of ideas from which expression inevitably springs. Also, the production of ideas consumes

few resources and thus needs few of the economic incentives required for the protection of more fully realized works.²⁴

Originality is a *sine qua non* for copyright protection.²⁵ Copyright protects the originality in the expression of a thought or information in some concrete form.²⁶ However, the concept of originality varies from legislation to legislation. Civil law jurisdictions like those of France and Germany who prefer to call the right in question as author's rights (*droit d'auteur*) generally insist upon a high degree of originality whereas in common law traditions as those of United Kingdom and India the threshold level of originality insisted for getting protection is not so high. It should be the original creation of the author. That is to say, the work should not have been copied from another work. It should be the result of the skill and labour of the author. Both traditions, however, agree, that originality does not require that the work should be the expression of original or inventive thought.

Another basic principle in copyright is that protection should not be subject to formalities.²⁷ While copyright, like other intellectual property rights, is a statutory right, unlike other IPRs, it is not to be acquired through a process of law. Copyright is inherent in the creation of an original work. The author gets his copyright instantly on the creation of the work without any application to or registration with any statutory or non-statutory.

Like any other property, copyright is transferable. In fact, it is 'transferability' which really makes it a property, a "per-

sonal and moveable property." Transferability is necessary for proper exploitation of the rights. In copyright the transfer takes place through assignments²⁸. An assignment is in essence a transfer of ownership even if it is partial. Unlike the case with other property, in the case of copyright there can be separate and independent owners for a single work, the ownership being portioned out for doing different acts, at different times and in different areas. As Copinger puts it, "Rights of this character can be divided up horizontally and vertically so that different people can own different rights in different countries."²⁹ The assignment is required to be in writing. An assignee can further assign the same to another person. A copyright owner can permit another person to do certain acts without assignment. This is by licensing.³⁰ In the case of licensing the ownership does not get transferred. While an assignment is in essence a transfer of ownership, even if it is partial; on the other hand a licence is a permission to do something which but for the licence would be an infringement. Copyrights can be transferred also by a testamentary disposition or by the operation of law as in the case of other properties. On the death of the owner, the right passes on to the legal heirs.

Traditional Copyright Issues in Education

There are three areas of copyright, which have special significance for educational institutions. These are the laws relating to the works protected, the ownership of copyright and the use of the works protected by copyright regime.

Scope of Works

The objects of copyright protection are referred to as 'works'. The first articles, which got copyright protection in the modern world, were books. While in course of time copyright protection has extended to several other artistic and creative expressions, literary works continued to be a major area in which educational institutions had a stake.

Most issues in 'literary work' that had been agitated in the past related to the scope of that term. The unamended Copyright Act, 1957, had a simple inclusive definition of that term to the effect that it "includes tables and compilations."³¹ What was really a literary work was left to case law to clarify. In the context of educational institutions, this had given rise to many questions such as whether books of arithmetic and algebra were literary works or whether question papers set up by examiners would come under the definition of literary work, or guide books could be considered as original literary works entitled for protection. Over the years, the courts have clarified many such cases. Thus, question papers set for examination,³² research theses and dissertations prepared by students,³³ compilation of a book on household accounts and domestic arithmetic³⁴, school textbooks,³⁵ guide books³⁶, a book of scientific questions and answers,³⁷ questionnaire for collecting statistical information,³⁸ and lecture notes have all come under the class of literary works entitled for copyright protection. By extension, course materials, research reports, laboratory notebooks in research laboratories, student course work and such other works

may also be within the ambit of copyright. However, syllabus "merely prescribing the guidelines which are to be followed by the textbook writers" has not been accepted as an original work.³⁹ Abridgements, adaptations and translations of existing works are new works and entitled for copyright protection though issues had arisen regarding the character of abridgement⁴⁰ and adaptation. Such new works will not have any copyright if the same infringes another's copyright. Anthologies and selections are extensively produced in the education system to cater to the requirements of students of various classes. Questions had been raised about copyright protection for such works in the past but the decisions have been in the positive.⁴¹

Many questions were raised as to the 'literary quality' of the literary work as well as the degree of originality required of the same for being entitled for copyright protection. So far as literary quality is concerned as early as 1916 in *University of London Press Ltd v University Tutorial Press Ltd* case Justice Peterson stated:

It may be difficult to define 'literary work', as used in this Act (Copyright Act 1911 of UK) but it seems to me plain that it is not confined to 'literary work' in the sense in which the phrase is applied, for instance, to Meredith's novels and the writings of Robert Louis Stevenson. In speaking of such writings, as literary works, one thinks of the quality, the style, and the literary finish, which they exhibit. ... The word 'literary work' seems to be used in a sense, somewhat similar to the use

of the word 'literature' in political or electioneering literature, and refers to written or printed matter.

The issue of originality also exercised the minds of courts. While the work need not be the expression of an original thought or idea, it must be the original expression of the thought. It should not have been copied from another but emanated from the author. Many judgements refer to the expending of labour and skill in a work to be considered as an original work. "There is no guiding principle as to the quantum of skill or judgement required."⁴² Similarly the issue of originality in collections, compilations⁴³, abridgements, adaptations, translations, dictionaries⁴⁴, etc. had posed problems in the past. So also questions were asked about satisfying the 'originality' criterion when different authors use the same facts. It is now accepted that use of same historical or scientific data or identical facts did not prevent a work from claiming copyright so long as it is not copy of another work.

Another doubt is related to the question of fixation. The general view had been that in order to be protected a work must be expressed in print or writing. With the advancement of technology it has come to mean some kind of recording whether on paper or on tape or any other medium such as an electronic one. While the Indian Copyright Act does not explicitly state about the fixation question in the matter of literary works, the Copyright, Designs and Patents Act 1988 of the United Kingdom defines 'literary work' as "any work, other than a dramatic or

musical work, which is written, spoken or sung."⁴⁵ For subsistence of copyright in a literary, dramatic or musical work, the UK Act makes recording, in writing or otherwise, a precondition⁴⁶ whereas in Indian Act does not have such a qualifying clause for literary or other works for copyright subsistence in them. This leaves ground for exploring the possibility of copyright protection for original and oral literary and dramatic pieces. However, in the case of musical works, in India, the condition of fixation in a medium has been done away since 1994 as can be deduced from the amended definition of 'musical work' compared to the pre-amended one.⁴⁷ This was following Justice Krishna Iyer's observation in *Indian Performing Right Society v Eastern India Motion Picture Associates* case that the earlier provision was an "un-Indian feature."⁴⁸

The advent of computers leads to new creations of the mind in the form of computer programs. Since from the beginning the programs were 'written down' they were generally looked upon as literary works. However, doubts persisted as to whether they were really 'literary' or not. In order to remove all such doubts, the amendment to the Copyright Act in 1984 included 'computer programs' within the definition of literary works. The provision, after the amendments in 1994 and 1999 reads: "literary work" includes computer programs, tables and compilations including computer databases, leaving no doubt about extension of copyright protection to computer programmes and databases as literary works.⁴⁹

Artistic work is the other category, which has an important place in the academia. Artistic work is defined by the Copyright Act as meaning:

- (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;
- (ii) an architectural work or art; and
- (iii) any other work of artistic craftsmanship.⁵⁰

This provision is of particular significance for engineering, architecture and art schools. Drawing would include any kind of drawing whether mechanical or engineering or, for that matter, artistic. Even a drawing based upon an earlier drawing can also get copyright protection provided sufficient original skill and labour has been spent on creating it.⁵¹ A photograph gets protection as an artistic work.⁵² Even a portrait based on two photographs could become the subject of copyright if it is original and produced a result different from the photographs.⁵³

So far as educational institutions are concerned the other classes of works such as dramatic works, musical works, sound recordings and cinematograph films have not posed much definitional issues in India.

Ownership of Copyright

Ownership of works created by academics has been a major problem. Generally the first owner of copyright in a work is the author.⁵⁴ The author in relation to a literary or dramatic work is the creator or writer of that work.⁵⁵ Composer is the author of a musical work⁵⁶ whereas in the

case of an artistic work, other than a photograph, it is the artist.⁵⁷ In relation to a photograph, the author is the person who takes the photograph.⁵⁸ In the case of a cinematograph film and a sound recording the producer is the author.⁵⁹ In relation to any literary, dramatic, musical or artistic work which is computer generated, the person who causes the work to be created is the author and, thereby, the first owner of the copyright therein.⁶⁰

There are, however, some exceptions to this general rule such as:

- (a) Literary, dramatic or artistic work made by an author in the course of employment in a newspaper or periodical (in which case the proprietor of the newspaper or periodical is the owner so far as publication in the newspaper or periodical is concerned);⁶¹
- (b) Photograph, painting, portrait, engraving, and cinematograph film made for valuable consideration (in which case the person who paid the valuable consideration);⁶²
- (c) Work made in the course of author's employment (in which case the employer);⁶³
- (d) Public speech on behalf of another person (in which case the other person);⁶⁴
- (e) Government work (in which case the government);⁶⁵
- (f) Work of a public undertaking (in which case the public undertaking)⁶⁶; and
- (g) Work of an international organization (in which case the organization).⁶⁷

The issue of ownership of work created in academic institutions has exercised the mind of courts in India and abroad many times in the past. One of the reputed copyright cases in England related to ownership of copyright in question papers of a university. This was the already cited *University of London Press v University Tutorial Press* case.⁶⁸ This case discussed in detail the difference between 'contract of service' and 'contract for service,' an issue for persons undertaking work on behalf of school and college boards of examination. Keeping in view the freedom enjoyed by the paper setter as to the time and space for preparing the question paper and the skill and judgement required of the examiner, the court came to the conclusion that he was not acting under the 'contract of service' (apprenticeship) but under the 'contract for service' (independent contractor) and therefore the copyright vests in him. In *Jagdish Prasad Gupta v Parmeshwar Prasad Singh*⁶⁹ also the point of dispute was about the ownership of question papers. The court held that the paper setters were the first owners of the copyright in those question papers. In *Agarwala Publishing House v Board of Higher Secondary and Intermediate Education, UP*⁷⁰ also this issue figured and the court held that the first owner of copyright in respect of examination question papers was the paper setter. One of the issues that had cropped up in the last case was whether question papers prepared for a board of education set up by the government could be considered as government work. If it was so ownership of copyright would be with the Board. The court did not agree

with that contention and observed, "Paper-setters are not in the position of servants acting under a contract of service and subject to the commands of the master as to the manner in which they shall work but they are like independent contractors acting under a contract for service not subject to direct control in the performance of those services." As such, question papers set for the examinations, in the absence of an assignment or contract giving up the claim for copyright belongs to the paper setter except in a master-servant relationship between the examination board and the paper setter in the matter of preparation of the question paper.

Another issue of ownership arises in the case of books, papers and articles written by the academics. It is commonly accepted that creative literature such as fiction, drama, poetry and so on are purely personal and copyright on them is with the author, even if the author is an employee of an institution. Doubts, however, arise when a professor or a teacher writes a book on the subject, which he is teaching. The question was agitated in the past and the courts have clarified⁷¹ that if a teacher or professor wrote a book on the subject he was teaching, he was the author and the owner of the copyright because he was employed to teach and not to write books.

While research theses are literary works and thus entitled for copyright protection, issues had been raised in the past as to who would be the owner of the copyright in the same, the student researcher or the research guide? It has been held that the copyright belongs to

the student and not the guide.⁷² But the work of an apprentice belongs to the master.⁷³

Use of Copyright Material in Educational Institutions

Educational institutions are one of the major users of copyright material. They do so by almost all methods of exploitation of a work, i.e., by reproduction, communication to the public, adaptation, abridgement, translation and even by performance. Copyrighted works are often required to be used in course materials and textbooks, in class rooms, in research work and in research theses, in examination question papers and answer books and in extracurricular activities by the students and the faculty such as entertainment programmes, publication of school/college magazines and so on.

Ordinarily any use of a copyrighted material needs permission of the owner⁷⁴. However, education is an activity, which requires special treatment in view of its role in human development. Hence statutory exemptions are given for some of the uses by educational institutions.

The Copyright Act permits a fair dealing with a literary, dramatic, musical or artistic work not being a computer program for the purpose of private use including research and criticism or review of that work or another work.⁷⁵ Some of the other permitted acts are:

The publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions, and so described in the title and in any advertisement issued by or on behalf of the publisher,

of short passages from published literary or dramatic works, not themselves published for the use of educational institutions, in which copyright subsists: Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years.⁷⁶

The reproduction of a literary, dramatic, musical or artistic 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 examination; or
- (iii) in answers, to such questions.⁷⁷

The performance in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and student of the institution, of or a cinematograph film or a sound recording, if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution or the communication to such an audience of a cinematograph film or sound recording.⁷⁸

Some other statutory exemptions also come handy for educational institutions in certain of their activities. These are the exemptions relating to:

the performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution;⁷⁹

the reproduction in a newspaper, magazine or other periodical of an article on current economic, political, so-

cial or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction,⁸⁰

the publication in a newspaper, magazine or other periodical of a report of a lecture delivered in public;⁸¹ and

the reproduction for the purpose of research or private study, or with a view to publication, of an unpublished literary, dramatic or musical works kept in a library, museum or other institution to which the public has access.⁸²

The special provisions relating to computer programs, which permit decompilation and reverse engineering under certain conditions are also of extreme relevance for educational programmes.⁸³

The statutory provisions, many of which were introduced through amendments to the original statutes, though, have not prevented issues being taken to the courts who, however, have generally adopted a pro-education approach in their interpretation as set out in a 1934 judgement:⁸⁴

All laws, which put a restraint upon human activity and enterprise, must be constructed in a reasonable and generous spirit. 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.

This is in line with an earlier judgement of the Allahabad High Court in 1916⁸⁵ which had held that when a person had “placed the results of his labours unreservedly at the disposal of the university authorities”, even though he would have desired remuneration or copyright

protection, once the university published the same, they became public property. In 1965, the Jammu & Kashmir High Court⁸⁶ also quoting the above case held,

once the original authors of the books allowed these books to be published by the university in their syllabus and the university in its turn published these books as part of the syllabus prescribed for the students, ... it was open to any member of the public to publish a review or a criticism or a guide to these books.

In a case involving a guidebook on E M Forster’s famous novel, *A Passage to India*, which was a book for general study in the B.A. course of the Madras University in 1955, dismissing the charge of infringement of copyright, the court held that the guide was a “commentary upon the original work, designed to enable University students to give effective answers to questions that maybe set in the university examination upon their study of the novel” and everything else was subordinate to that main function.⁸⁷ The reproductions in the guide were held as “fair dealing” within the provisions of the law. In *Romesh Chowdry v Ali Mohamad*⁸⁸ also the guide notes were well within the exception. However, in another case the Calcutta High Court took the view that guidebooks, which compete with the original textbooks, were not in the “general interest of educational advance of learning” and held them as not eligible for copyright protection.⁸⁹

Issues had also been posed as to what is ‘private study’ and what is ‘research’, for which copyrighted works can be used legitimately without permission of the

owner. Since the Act is silent on the meaning of these terms, courts have to take recourse to the dictionary meanings of them. In the *Blackwood v Parasuram case*⁹⁰ the court, however, clarified that private study did not involve publication and if the work was published it could not take protection under the clause relating to private study. The judgement quoted the following from *Copinger and Skone James*: “Private study only covers the case of a student copying out a book for his own use, but not the circulation of copies among other students.”⁹¹ Similarly, the court also rejected the argument that a guide book, which is a summary of a copyrighted work with substantial reproductions from the same in the form of extracts, is a research work since research is “an investigation directed to the discovery of some fact by careful study of a subject; investigation, inquiry in to things.”⁹²

The scope of “fair dealing”⁹³ had also been an issue in many instances. The statute does not define the phrase, and it is generally left to be decided in a case-to-case basis. A publication, which materially injures the copyright of the owner, has been held as not a fair dealing.⁹⁴ In fact, this goes in line with an English case where it was observed “full acknowledgement of the original, and the absence of any dishonest intention, will not excuse the appropriator where the effect of his appropriation is, of necessity to injure and supersede the sale of the original work.”⁹⁵

This also raises the issue of legality of reprography of books and other copyright material, a common practice in many

educational institutions. Reprography is reproduction and the statute makes reproduction an exclusive right of the owner of copyright. While any reproduction without permission, unless allowed under the fair use provisions, is an infringement of the copyright therein, ordinarily serious view is taken only when the entire work or a substantial part of it is copied and not in the case of duly acknowledged short quotations. Since the statute does not define what is substantial that will have to be done by the courts and it will depend on several factors including, as mentioned above, how the reproduction has materially adversely affected the copyright owner.

Two issues related to copyright, which have not received sufficient attention, particularly in educational institutions, are regarding use of premises of the institution and use of pirated software. The Copyright Act specifically prohibits the use of premises for copyright infringement⁹⁶ and also prescribes separate penalties for use of infringing copies of computer programs.⁹⁷ As commercial value of copyright increases, the owners are likely to take recourse to these provisions to contain infringement and institutions will have to be on their guard.

Emerging Challenges to Conventional Copyright Regime in Educational Institutions

The emergence of information technology (IT) has revolutionized the way information is stored and transmitted. Digital technologies have reduced expressions of knowledge, literature and arts into bits. This has made copying and dis-

semination easier and faster. At the click of a button, millions of copies of a work can be made and disseminated over different parts of the world. The digital copies from the original as well as from the digital copy itself are perfect ones. This has made protection of copyright a very difficult proposition to enforce while making copying an easy activity. There is a radical shift in the ability of individuals and academic institutions to reproduce, distribute, control and publish information, altering the economics of publishing.⁹⁸ Since the problem is one created by technology, the first place sought for a solution was technology itself. The result has been introduction of technological measures of protection⁹⁹ such as encryption, which prevent unauthorised copying of the material protected. A field where this has serious implications is education.

IT is increasingly being used in educational institutions in India. Internet and Intranet have become part of the teaching-learning process at almost all levels of education. Virtual classrooms have already become a reality. Distance education is now an instantaneous process. Students can access knowledge stored in any website anywhere in the world at their convenience. Teachers can instruct without having the students physically before them. Computer screens have replaced blackboards. Notes and materials are distributed not on paper but through computer networks.

All these developments have profound impact on copyright issues in the educational institutions. While some of the traditional issues have acquired new dimensions, totally new issues have also arisen.

There are administrative and access issues. Administrative issues relate to ownership and protection and access issues to use of works. In addition, there are certain non-educational issues such as misuse of new technology for copyright infringement of which the institutions have to be on the watch out.

Ownership of works created in and for educational institutions is likely to raise fresh issues in the context of digital technologies. While the books and papers that academicians write even on the subjects they are teaching may continue to be their intellectual property, the ownership of the copyright in the course materials and other teaching literature that they might create in order to discharge their duties as employees of the university may lead to disputes between the institutions and the creators. For example, if a professor conceived and concretized a particular course in a university, ran it for some time, then quit that institution and joined another one, whether he could run the same course in the new institution without infringing copyright may very well become an issue. Technological changes have also altered the model of creation of works within the educational institution. Collaboration and association of a number of persons within the faculty and staff are many a time involved in the production of multi-media education kits used particularly in distance education. There may also be instances where administrative studies may be entrusted to the faculty such as, for example, a study on the use of computers in the college or university. The issue of ownership of the study report could be a contentious issue between the faculty and the institution.

Unlike in the past, higher education institutions are now encouraged to generate their own revenue and attract private funding instead of being solely dependent on grants from the public exchequer. Consequently, a number of institutions undertake industry sponsored R&D programmes, surveys, studies, etc. for a price. The copyright ownership of the resultant studies may pose a problem in the absence of clear contractual provisions. Even where the university and the sponsor have a contract assigning copyright to either of them or both, issues may crop up on the ownership rights of the faculty and students who are the authors of the output works.

Computer education is one area where the ownership issue may have a new dimension. The faculty and students, as part of a class project, may create new software programs, which could be later commercially exploited. While there is no doubt that the resultant software is their intellectual product, the creation of the same involved utilization of the institutional facilities, materials and class time. In such situations disputes between the institution and the authors as to the ownership cannot be ruled out.

Protection problems are also likely to assume major proportions as education through IT leads to placement of substantial copyright material on the Net. This is particularly so in paid distance and online education programmes. Can universities prevent Ekalavyas? To illustrate, out of a group of ten students, nine register as private candidates and one enrolls in the distance education programme. The enrolled one gets the learning material through the

Net, downloads the material and distributes the same to the group. Is it possible to prevent his sharing the material with the other nine who did not pay for the same?

One of the problems associated with online courses and websites is that of choice of law. The Internet is a borderless web whereas copyright laws are national in nature. Laws of all countries are not alike and an act, which is legal in one country, may be illegal in another country. Litigations have to be based on the law of the country where the proceedings are initiated. In such a situation, universities will have to decide on choice of law for fighting infringement of their copyright material on the Web keeping in view which country's law suits their interests best when the owner and infringer belong to different countries. The issue also will arise in joint ventures and courses with universities abroad and provisions regarding the law applicable will have to be negotiated before starting on such ventures.

Perhaps, the most crucial issue is the one about access to copyright material in the digital environment where access involves reproduction and copying. While the technological measures of protection employed by a right owner prevent copying, they also take away the access to the works, whether allowed under the fair use provisions or not. As technology is not moral sensitive, it does not distinguish between legal copying and illegal copying. The already existing right of use for research, education or quotation, etc. gets withdrawn from the public thus tilting the legal balance against the societal interest.

This, in the long run, may stunt intellectual and cultural growth. In this context, educational institutions face the problem of how to retain and avail themselves of the statutory exemptions provided for education and research. It may be necessary for educational institutions to work with content providers on how to develop a mechanism for fair use exemptions in the digital environment. Institutions may have to see how the existing legal exemptions can be worked out in the digital context through clarifications or amendments to the statute wherever necessary.

So far as university administrators are concerned, they already may be having new problems in hand because of the fast spread of computers. Earlier, the major infringing activity of reprography of books and papers was taking place outside the institution's premises and was done by outsiders. Now in order to reproduce any digital work, one needs only a computer and consequently students and teachers can download and disseminate any number of copies of copyrighted works such as music. Unauthorised music downloads in university campuses have emerged as a major problem in the West. It is quite possible that in the Indian campuses also such unauthorized downloads in literary and musical works and cinematograph films are taking place.

Conclusion

While technological progress is a boon, it comes with a host of problems. They are never insurmountable. Most often as not technology itself comes out with solutions. However, policies, programmes and laws have to keep track of technological progress and make suitable amend-

ments in the same to make use of the best effects of such developments. What are perhaps needed in Indian educational institutions are dynamic new policies. Each institution would need to have a copyright policy. The overall objectives of such policies should be provision of incentive for the faculty and other employees of the university for creation of quality works, facilitation of easy access to the treasury of human knowledge by the faculty and students and creation of a tension free atmosphere for the academic work. Towards this, the policy should set out clear guidelines as to regulating the ownership and exploitation of works by its faculty and students. It may perhaps even be necessary for institutions to have contracts with its employees and may be even with students. Simultaneously, it is also necessary for institutions to come out of their apathy towards government policy formulation and legislation in copyright matters. They should examine whether current legislations are sufficient to enable them to continue their mission of educating people or whether any amendments in laws are required to facilitate their task in the light of new technologies. Primary objective of a higher education institution is imparting education at affordable prices to the people. It should, therefore, act as a watchdog for protecting public access rights and ensuring that the balance between author's rights and society's larger interests is not tilted.

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Bibliography

Consortium for Educational Technology for University Systems, Ownership of New Works at the University: Unbundling of Rights and the Pursuit of Higher Learning, 1997, available at <http://www.cetus.org>.

Kelley Kimberly B, Courseware Development for Distance Education: Issues and Policy Models for Faculty Ownership, 2000, available at <http://www.educause.edu>.

The National Academies Policy Advisory Group, *Intellectual Property and the Academic Community*, The Royal Society, London, 1995.

Townsend Elizabeth, Legal and Policy Responses to the Disappearing “Teacher Exception,” or Copyright Ownership in the 21st Century University in Minnesota *Intellectual Property Review*, 2003, <http://mipr.umn.edu>.

Twigg Carol A, *Who Owns Online Courses and Course Materials? Intellectual Property Policies for a New Learning Environment* (Centre for Academic Transformation, New York), 2000, available at <http://www.center.rpi.edu>.

References

- 1 *The Report of the University Education Commission* under the chairmanship of S Radhakrishnan; Government of India, Ministry of Education and Culture, 1983, p1
- 2 The Calcutta University, the first Western style Indian university, was established in 1857, p8 *ibid*
- 3 Act No. XX. of 1847, Calcutta, 1848: Printed at the Military Orphan Press, by W Ridsdale
- 4 Section I *ibid*
- 5 Section II *ibid*
- 6 I L R (1895) 19 Bom. 557
- 7 Enforced w.e.f 21st January, 1958, *vide* S.R.O. 269 dated 21st January 1958
- 8 Universities of St Andrews, Glasgow, Aberdeen and Edinburgh
- 9 *Copinger and Skone James on Copyright* (Sweet & Maxwell), 13th ed, 1991, Para 13-48
- 10 *See* Section 57 of the Copyright Act, 1957 and Article 6^{bis} of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 1971) (Hereafter Berne Convention)
- 11 *See* Article 27 of the Universal Declaration on Human Rights
- 12 Privy Council in *Macmillan & Co Ltd v Cooper (K&J)* (1923) 932. J P C 113
- 13 *See* Section 14 of Copyright Act, 1957
- 14 4 Burr. 2408; *see* Stewart James, *International Copyright and Neighbouring Rights* (Butterworths, London), 2nd ed, 1989, p 23
- 15 *See* para. 21 of *Guide on Surveying the Economic Contribution of the Copyright-based Industries* by World Intellectual Property Organisation (WIPO) Geneva, 2003
- 16 Article 7 of the Berne Convention
- 17 Sections 22-29 of the Copyright Act, 1957
- 18 *See* Sections 31A, 32 and 32A of the Copyright Act for other cases of compulsory licences
- 19 The Copyright Act, 1957 puts such uses under Section 52 with the heading ‘Certain acts not to be infringement of copyright’ and uses the expression ‘fair dealing’ in Sub-section (1) (a) therein. In this paper ‘fair use’ and ‘fair dealing’ are used interchangeably to refer to all permitted acts under the copyright law
- 20 Article 9 of the Berne Convention
- 21 Article 10 *ibid*
- 22 Article 10^{bis} *ibid*
- 23 Supreme Court in *R G Anand v M/s Deluxe Films and Others*, AIR. 1978 SC 1613
- 24 Goldstein Paul, *Copyright – Principles, Law and Practice* (Little Brown Co, Canada), Vol. II, pp 512-513
- 25 The Copyright Act, 1957 does not qualify cinematograph films and sound recordings with the adjective ‘original’ possibly because they include other original works. *See* Section 13 of the Act
- 26 Copinger W A, *Copinger and Skone James on Copyright* (Sweet & Maxwell, London), 1991,

- p165
- 27 Article 5 (2) of the Berne Convention
- 28 See Sections 17-21 *ibid*
- 29 Copinger, *op.cit*, p 111
- 30 See Sections 30-32B of the Copyright Act, 1957
- 31 Section 2(o) before the amendment by Act No 23 of 1983
- 32 *Jagdish Prasad v Parameshwar Prasad*, AIR 1966 Patna 33; *Aggarwala Publishing House v Board of High School and Intermediate Education UP*, AIR, 1957 Allahabad 9
- 33 *Fateh Singh Mehta v Singhal*, 1990, A.I.R. 1990, Rajasthan 8
- 34 *Manohar Lal Gupta v State of Haryana* (1977) 79 Punj LR 181 (Delhi)
- 35 *Ghafur v Jwala* AIR, 1921 All 95. Also *Educational Co of Ireland Ltd v Fallom Bros Ltd* (1919) 1 Ir R 62
- 36 *E M Forster v A N Parasuram*, AI R 1964 Madras 391
- 37 *Jarrold v Houlston* (1857) 3 K&J 708
- 38 *Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales* (1977) RPC 149
- 39 *M/s Nag Book House v State of West Bengal* AIR 1982 Cal. 245
- 40 *Mary P Marshall v Ram Narain Lal*, AIR 1934 Allahabad 922. At issue was the abridgement of Marshall's *Principles of Economics* entitled *A Digest of Marshall's Principles of Economics* by Dr King; *Macmillan v Cooper*, 1923 Law Reports 51 Indian appeals 101
- 41 *Macmillan v Suresh Chunder Deb*, ILR 17 951 At issue was reproduction of Palgrave's *Golden Treasury of English Songs and Lyrics*
- 42 Copinger and Skone James, 3-52, *op.cit*
- 43 *Macmillan v Suresh Chander Deb* ILR 17 C 951
- 44 *Govindan v Gopalkrishna*, AIR 1955 Mad. 391
- 45 Section 3 (1) of Copyright, Designs and Patents Act, 1988 (CDP Act)
- 46 Section 3 (2) of CDP Act *ibid*
- 47 See Section 2 (p) of the Copyright Act, 1957 as amended in 1994 which reads as "musical work" means a work consisting of music and includes any graphical notation of such work but does not include any works or any action intended to be sung, spoken or performed with the music. Before the amendment it read, "musical work" means any combination of melody and harmony or either of them, printed, reduced to writing or otherwise graphically produced or reproduced
- 48 AIR 1977 SC 1443
- 49 Before the amendment in 1984 the provision read: "literary work" includes tables and compilations. After the 1984 amendment and before the 1994 amendment it read: "Literary work" includes tables, compilations and computer programmes, that is to say, programmes recorded on any disc, tape, perforated media or other information storage device, which, if fed into or located in a computer or computer based equipment, is capable of reproducing any information
- 50 Section 2 (c) of the Copyright Act, 1957
- 51 *Alibert v O'Connor*, 1982 FSR 317
- 52 Section 2 (c) (i) of the Copyright Act, 1957
- 53 *Associated Publishers v. Bashyam*, AIR. 1964 Madras 114
- 54 Section 17 of Copyright Act, 1957
- 55 Section 2 (d) (i) *ibid*
- 56 Section 2 (d) (ii) *ibid*
- 57 Section 2 (d) (iii) *ibid*
- 58 Section 2 (d) (iv) *ibid*
- 59 Section 2 (d) (v) *ibid*
- 60 Section 2 (d) (vi) *ibid*
- 61 Proviso (a) of Section 17 of the Copyright Act, 1957
- 62 Proviso (b) *ibid*
- 63 Proviso (c) *ibid*
- 64 Proviso (cc) *ibid*
- 65 Proviso (d) *ibid*
- 66 Proviso (dd) *ibid*
- 67 Proviso (e) *ibid*
- 68 1916 2 Ch 601
- 69 AIR 1966 Patna 33
- 70 AIR 1967, Allahabad 91
- 71 *Stevenson Jordan v MacDonald Evans* (1952) 69 RPC 10
- 72 *Fateh Singh Mehta v Singhal*, 1990 *op.cit*
- 73 *Dunk v George Waller*, 1970 2 WLR 241
- 74 The acts, which come under the ambit of copyright, are specified in Section 14 of the Copyright Act, 1957. While they vary from one of work to another, generally comprise reproduction including storing in any medium

- by electronic means, issuing copies, communication to the public, public performance, translation, and adaptation. In the case of computer programmes, cinematograph films and sound recordings sale and commercial renting are also part of copyright
- 75 Section 52(1)(a) of the Copyright Act, 1957
 76 Section 52 (1) (g) *ibid*
 77 Section 52 (1) (h)
 78 Section 52 (1) (i) *ibid*
 79 Section 52 (1) (l) *ibid*
 80 Section 52 (1) (m) *ibid*
 81 Section 52 (1) (n) *ibid*
 82 Section 52 (1) (p) *ibid*
 83 See Section 52 (aa), (ab) (ac) and (ad) *ibid*
 84 *Kartar Singh Giani v Ladha Singh*, AIR 1934 Lah. 777
 85 *Mohamed Abdul Jalil v Ram Dayal*, AIR 1916 All. 216
 86 *Ramesh Chowdhry v Kh. Ali Mohammad Nowsheri*, AIR 1965, J&K, 101
 87 *E M Forster v A N Parasuram*, AIR 1964 Madras 331
 88 *Op.cit*
 89 *Secondary Board of Education v The Standard Book Company, Calcutta Weekly Notes* (1966) 1130
 90 *M/s Blackwood & Sons v A N Parasuram*, AIR 1959 Madras 410
 91 *Ibid*
 92 *Ibid*
 93 Some legislations use the term ‘fair use’ whereas the Indian Act uses the term ‘fair dealing’. The terms have been used interchangeably in this paper
- 94 *M/s Blackwood & Sons v A N Parasuram*, AIR 1959 Madras 410
 95 *Scott v Stanford*, 1867, L R 3 Eq. 718
 96 Section 51, *inter alia*, states that when any person, permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright
 97 Section 63B of the Copyright Act, 1957, *op.cit*
 98 See http://www.nap.edu/html/digital_dilemma/ for the report entitled *Digital Dilemma* by the Committee on Intellectual Property Rights and the Emerging Information Infrastructure (2000)
 99 The WIPO (World Intellectual Property Organisation) Copyright Treaty (WCT) (1996) makes it an obligation of the contracting parties “to provide adequate legal protection and effective legal remedies against circumvention of effective technological measures that are used by authors in connection with exercise of their (copy) rights ... and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law” (See Article 11 therein)