Creating Cogent Copyright Policy for Course-Packs – A Look at the DU Photocopy Case

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The Delhi High Court’s judgment in the recent “DU Photocopy Case” legitimised the photocopying required to create Course-Packs, by stating that the education exception in India’s Copyright law permitted such reproduction. This note attempts to pry into the theoretical underpinnings of Copyright law, by dissecting the relevant Natural Rights and Utilitarian justifications for Intellectual Property (IP). In doing so, it identifies types of policy level considerations, including an education exception as defined by the Delhi High Court, that would ensure the greatest access to works while also continuing to provide the necessary incentives to continue publishing.

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In August 2012, three international publishing houses (Oxford, Cambridge and Taylor & Francis) initiated a copyright infringement petition (The Chancellor Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services, 2016) against a photocopy shop associated with Delhi University (DU). The petition centered on the legitimacy of academic ‘course packs’ used in universities.

‘Course packs’ are compilations of required readings, often certain excerpts or small portions from a wide variety of text books, brought together as one collection to be used by students in a course. Given the high costs and the impracticality of students purchasing each of the many textbook from which readings are assigned, this has been the default mode of instruction in several Universities across the country.

The high-profile case rightly caught the attention of students, academics, publishers and the general public at large, with much being written (Mohanty, 2012; AFP, 2013; Basheer, 2013) about how a negative decision could very well affect the cost of, and thereby access to education. This also led to interventions being filed in the suit by a student group (Association of Students for Equitable Access to Knowledge), and by a group of academics (Society for Promoting Educational Access and Knowledge). Notably, 33 of the authors whose works had been reproduced in the course packs had also joined in asking the publishers to drop the case (Guha, 2013). Nonetheless, the publishers, being the copyright holders, continued to press forward with the case.

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In their suit, the publishers argued that the photocopying that takes place in creating these course packs amounts to copyright infringement. The defendants argued that this reproduction of materials was being done for educational purposes and therefore fell within the exceptions provided by the Copyright Act. Finally nearly four years later, in September 2016, the Delhi High Court came out with its judgment dismissing the suit and clarifying that no copyright infringement had taken place as the education exception provided by Section 52(1) of the Copyright Act protected such activity.

In the course of the 94-page judgment penned by Justice Endlaw (*The Chancellor Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services*, 2016), he mentions three major points as to why the suit was dismissed:

a) That copyright is a statutory right and not a natural right, and thus any rights granted by the statute are also limited by the exceptions and limitations provided for in that same statute. In this case, Section 52(1) of the Copyright Act provided that reproduction done for educational purposes would not constitute copyright infringement.

b) That this provision allowing reproduction by a ‘teacher/pupil in the course of instruction’ should be interpreted very widely, so as to not restrict such reproduction to a particular student, teacher, lecture or classroom; and that when hand-scribing of texts for a course is not considered infringement, the use of technology to make the task less onerous does not convert it to infringement either;

c) That Copyright is not a divine/natural right but should be considered in context of its purpose of increasing the harvest of knowledge.

While this landmark decision marked the acceptance of ‘course-packs’ as legitimate in Indian copyright jurisprudence, much of the discourse surrounding the high profile case has dragged copyright out of the context-less silo it had been in, and placed it squarely within an ‘Access to Knowledge’ framework. Indeed, of those celebrating the Delhi High Court’s decision, many were not celebrating the legal or technical interpretation of Section 52(1) of the Copyright Act, but rather the wider ramifications that such an interpretation has, or the context-driven interpretation of the Copyright Act, which led to this decision.

**Justifications for copyright**

In clarifying that copyright is not a natural right, Justice Endlaw dove straight into an age-old debate regarding the justifications or the basis for intellectual property rights (IPR). The “Natural Rights” justification which stems from a more Lockean approach (Locke, 1821), places property owners’ rights central to the grant of such entitlements. Here, owners are seen to ‘deserve’ such state sponsored exclusion rights (copyrights in this instance) due to the labour and resources they have directed towards socially valuable endeavours. This narrative is often further supplanted by work from the Chicago School of Economics (Demsetz, 1967) which views individual caretakers, and thus private property as the best way to prevent the ‘tragedy of the commons’, i.e., to prevent inefficient use of physical resources.
However, the primary criticism of the Natural Rights approach, and one of the main criticisms of how maximalist IP policy tends to be implemented, is that it draws upon theory that relates to tangible goods. Intangible goods such as information, the subject matter of Copyright, in contradistinction to tangible goods, are ‘non-rivalrous’ in nature (Arrow, 1962, p. 623). This means that one person’s consumption or usage of such a good does not diminish the good in any way for any other user. Rather, the ‘non-rival’ characteristics of information goods imply that sharing such information widely is a more efficient usage of such resource.

Given the freely reproducible and therefore accessible nature of information goods (in the absence of such exclusion rights), it is also often very difficult to proportion appropriate credit towards the so called ‘creator’ who has reached that position by using information collected from various other sources (Fisher, 2001, p.168). In other words, creators nearly always reach where they are because they are standing on the shoulders of giants. Thus, in the context of intangible goods, both, the idea that a private owner ‘deserves’ to have exclusive rights over information goods, as well as the idea that a gatekeeper would ensure the optimal usage of such resource holds little weight.

Justice Endlaw doesn’t expound upon the reasons he rejects the Natural rights approach but he certainly does draw upon the utilitarian ‘incentive theory’ (Fisher, 2001) when he says:

[Copyright] 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. (The Chancellor Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services, 2016).

While it isn’t incorrect to say that the incentive theory balances users’ rights with creators’ rights, it would perhaps be more accurate to say that the incentive theory allows creators’ exclusion rights only where society at large is benefitted.

To clarify this point, the ‘non-rival’ nature of intangible goods must be looked at again. While it may be more efficient to freely share an intangible good at a given point in time, it is nearly always the case that some amounts of material resources, time and effort have been used in the process of creating new information goods. Once created though, these information goods can be easily reproduced by any other party at marginal cost; leading to the potential problem of free riders dissuading creative activity. As per the incentive theory, exclusion rights that prevent this free-riding are granted to ensure that creative activity continues to be incentivized. In economic terms, this is a trade-off between accepting ‘static inefficiencies’ (i.e., the inefficiencies caused due to exclusion rights preventing the optimal usage a resource at a particular point in time) in order to secure a continued/higher rate of creative activity over time, (i.e., ‘dynamic efficiency’).

Where such free riding does in fact dissuade creative activity, public policy consideration requires allowing only as much ‘static inefficiency’ as is required to ensure the desired
rate of ‘dynamic efficiency’. In other words, at a policy level, creators’ rights are acceptable only up to the extent that they actually incentivize creation. Therefore the question of determining the necessary limits of creators’ rights (static inefficiencies) in IP policy turns on determining exactly how much of such free-riding would hamper further creative activity.

Sectors where heavy capital investment is required (e.g., pharmaceuticals, biotechnology, etc.) are usually presented as the poster-child case for granting these exclusion rights, since these are businesses that claim they must multiply their initial investments in order to continue innovating, and therefore have a lot to lose from free-riders who can reproduce their work at marginal cost. However sectors with low capital investment often see creators participating in the creative process for a varied range of reasons, and not necessarily with financial considerations, especially with the advent of more digital technologies where the production and distribution costs are dramatically reduced. Further more, creators in these sectors often find that they can also benefit from more sharing of their work, as this could facilitate cooperation as well as new productions of works (Krikorian, 2010, p. 575). Academic authors are one such segment – where academics produce texts for a variety of non-monetary reasons including securing tenure, reputation gains, sharing in the spirit of scientific inquiry, etc. (Lessig, 2011).

Publishing in general, and academic publishing more specifically see the confluence of two stakeholders with different incentives coming together to produce the eventual outcome: academics, who rarely participate with the incentive of monetary benefits, and publishers who rarely participate without the incentive of monetary benefits. Therefore, a utilitarian matrix would recognize that exclusion rights need only be granted to the extent that it would continue to provide necessary financial incentives for publishers, but not the extent that it would restrict the spread of information goods more than is required – especially since the one half of the creators (i.e., the academics) do not require such financial incentives to continue creating new works.

It would follow that in order to minimise static inefficiencies, the rights granted to the copyright holders (publishers) can be limited to only what is necessary to keep their actual markets largely unaffected. To restate the reason for course packs being used so commonly across the country – it is largely impractical and usually prohibitively expensive for students to buy all these textbooks. In other words, students are not the market that is buying the textbooks to start with. Therefore, an exception or limitation to Copyright policy that allows the non-market audience to easily/freely access these textbooks ought to be allowed as it ensures more efficient usage of the information, while also not affecting dynamic efficiency. It is worth noting at this point that this particular judgment does not discuss full-text copying but only refers to reproduction of course packs. Some commenters have suggested that if the question of full-text copying comes up, a ‘reasonable nexus’ text could be used, wherein the question of infringement turns upon whether it is necessary for such copying to be done for the purpose of educational instruction (Basheer, 2016).
Additionally, while there is no doubt that publishers contribute value to the process, it must be kept in mind that even some of this value is gained not through capital investment but through unpaid peer-reviews. These peer-reviews are also not done due to financial incentives but through other non-monetary incentives. Thus, in calibrating the extent to which exclusion rights should be granted, this value too need not be captured, as it would otherwise be unnecessarily allowing publishers to capture more value than required. To appropriately calibrate this policy framework, analysts require (currently non-existent) data on the actual costs incurred by publishers, as well as data on their markets and margins. However, while direct data on academic publishing costs may not yet be available, there are several reports which show that the (larger) publishing industry has been growing, with large amounts of credit being given to increased literacy levels (Neilsen, 2015; Dasgupta, 2016). Given that course-packs have been in wide usage for the past few decades already, it seems a far-fetched argument that course-packs which had already been widely used in practice, would now suddenly harm academic publisher incentives due to the law pronouncing course-packs with legal legitimacy.

Further, access to education has a special significance in a in the ‘network economy’ due to the import that information has in today’s knowledge ecology. As Manuel Castells describes it, “the action of knowledge upon knowledge itself is now the basis of increased productivity” (Castells, 2010, p.17). In such a scenario, a wide interpretation of an educational exception to copyright as non-infringement shows an understanding of the larger social benefits that flow from not allowing over-broad copyright laws, and this is exactly what the Delhi High Court has done in this decision.

Coming at a time where India’s IP Policy is facing great scrutiny at the world stage (Barooah, 2015), and where developed nations are increasingly pressuring developing countries to treat IP rights as an end in themselves, (Barooah, 2014), this decision by the Delhi High Court shows a welcome contextualizing of IP policy with India’s socio-economic realities, rather than the lobbyist drive industry concerns of the developed countries.

One can hope that with these developments and the discussions around them, all concerned stakeholders will seek to better understand as well as expand upon the impacts of these information regulation mechanisms.

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Court Law Citations
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