

## NOTES AND COMMENTS

### PHOTOSTATTING IN INSTITUTES OF HIGHER EDUCATION - CURSE FOR COPYRIGHT OWNERS OR A BOON FOR THE RESEARCHERS ?

#### Abstract

Photostatting machines are installed in all the educational institutions today. The faculty, researchers and students get reading material photocopied for their personal and private use rather than buying expensive books. Researchers get facsimile copies at cheap rates and a fast pace, photocopiers get a continuous business but the copyright owners are deprived of the royalty because the users are indulging in photocopy rather than buying the books. Jurisprudentially speaking, the time is ripe to strike a balance between competing/conflicting interests of authors, publishers and copyright owners on one side and public's right to have a ready access to information and knowledge for growth and development on the other. This paper deals with the dilemmas in existence and tries to work out some solutions.

#### I Contemporary scenario: the dilemmas

“EDUCATION ALONE is the foundation on which a progressive, prosperous society can be built...We should seek not just functional literacy, but good quality education – education that is affordable, accessible, equitable – and available to every boy and girl who seeks to study.”<sup>1</sup> These encouraging words come at a time when India is going through an upheaval of changes in the education sector, and yet statistics show that government's expenditure on education stood only at 3.85 per cent of gross domestic product (GDP) in 2009-10. According to World Bank data, in the same year, the expenditure on education in sub-Saharan Ethiopia was 4.6 percent of GDP, 5.3 per cent in Ghana and 4.6 per cent in Bhutan.<sup>2</sup>

The result is that both rural and urban India are witnessing mushrooming of private schools, colleges, universities, tuition centres, preparatory centres for entrance into professional colleges, professional institutes, research institutes *etc.* Though these institutes manage to get recognition from the authorities, they lack basic

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1. Prime Minister of India, Dr. Manmohan Singh, *The Prime Minister's Independence Day Speech* (New Delhi, August, 2007), available at: <http://pmindia.nic.in/speech/content.asp?id=570> (last visited on Aug.15, 2012).

2. World Bank data, available at: <http://data.worldbank.org/indicator/SE.XPD.TOTL.GD.ZS?> (last visited on Aug. 15, 2012).



infrastructure to sustain an educational environment. Among other problems, the lack of funds, space for libraries and unavailability of books in the market are most common.

The most easy and feasible solution to unavailability and unaffordability of books was thought to be photostatting. Photocopy shops have been allowed to operate in colleges and universities, providing copies of books and reading material at affordable rates. Shops with photostat facility not only helped in providing high quality facsimile copies of books at a cheap rate but also at a very fast pace in the vicinity of these seats of learning. It has become a win-win situation for both the students, teachers and researchers on one hand and the photocopy business on the other.

However, a strong resentment to the practice of photocopy comes from authors and publishers who lose out on their royalty as their books are not being bought from the market. Thus, photocopying makes copies of books available at cheap rates to users but without any monetary return to the owners of copyright.

Recently in August, 2012, a few publishers filed a copyright infringement case against a photocopier who, under implied or express permission by University of Delhi, was making photostatted “Course pack” or “Study material” available to students and researchers alike.<sup>3</sup> The pro-author/publisher lobby have pitched their concern and asserted that publishers are not charity houses who will be giving their work for free, even for a noble cause like education. Thus the issue boils down to rights of copyright owners versus the rights of public to access the work.

Jurisprudentially speaking, the time is ripe to strike a balance between competing/conflicting interests of authors, publishers and copyright owners on one side and public’s right to have a ready access to information and knowledge for growth and development on the other. There is a pressing need for the law to strike an appropriate balance between the authors’ interest in preserving the integrity of his copyright and the public’s right to enjoy the benefit of photocopying, a technological development.<sup>4</sup>

The rights of the copyright owners have never been absolute. The most universal limitations to the right of authors to make a copy or right to reproduce their work are: right to copy minor or insubstantial parts,<sup>5</sup> right of fair dealing or rights of the nature of “public benefit”.<sup>6</sup> In other words, it has always been the policy of the law, not to grant absolute monopoly to the authors. The copyright owners feel that

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3. Basant Kumar, “Copyright test for students – photocopying of books shops in Delhi University after raid” *The Telegraph* Aug. 28, 2012, available at: [www.telegraphindia.com](http://www.telegraphindia.com) (last visited on Oct. 10, 2012).

4. See, Copyright Law Review Committee on Australian Law (Australian Government Publishers Service, Canberra, 1959) para 13; Report of the Copyright Law Committee on Reprographic Reproduction (Australian Government Publishing Service, Canberra 1976).

5. India Copyright Act, 1957 (ICA, 1957), s.14.

6. *Id.*, s. 52.

some of the “public benefit” claims are unreasonable as they prejudice their legitimate and economic interests.

The problem is a complex one because of following reasons:

- a) Users of the work are not always willing or able to pay the price that the copyright owners may regard as “reasonable”.
- b) There are works for which the educational sector is effectively the whole market for example, textbooks for colleges *etc.* Widespread copying of such works might mean they become uneconomic to produce, in the absence of proper controls.
- c) The ‘course packs’ are compilations consisting of copyrighted and non copyrighted material. It may consist of i) articles from journals which are purely academic in the sense that journal is available for a cost but the authors have never been paid the price for writing;<sup>7</sup> (ii) Insubstantial parts (less than 10% of the book) are copied;<sup>8</sup> (iii) copies of material from public domain are provided to students;<sup>9</sup> (iv) Teachers make multiple copies from books meant for mass market as it discusses a topical issue.<sup>10</sup>
- d) There is a good deal of uncertainty about the limits of permitted copying due to the fact that the exception of fair dealing is stated in general terms.<sup>11</sup> There is no elaboration by the legislation with respect to factors that have to be taken into account while determining what is fair/unfair.
- e) There is a virtual impossibility of copyright owners effectively policing the present limits of permitted copying and their understandable concern that the widespread copying may be making substantial inroads into their economic interests.
- f) The users of copyright material are not even aware that they are violating the copyright of authors or in any way bringing monetary losses to them.

## II International efforts to deal with the problem of reprography.

The problem of the photographic reproduction of copyright works has been under study at the international level since 1961. The question of practical solution

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7. Most of the academic journals produced by educational and research organization fall in this category.

8. See rules of IRRO available at: [www.irro.in](http://www.irro.in) (last visited on Oct. 10, 2012).

9. A literary work comes into public domain: (i) if the work does not fall under section 13, ICA, 1957, (ii) the owner of the work relinquishes his copyright vide s. 21.(iii) the temporal duration has expired, see chapter V, ss. 22-29.

10. The students and faculty do not buy such books as only a few pages are relevant for them.

11. ICA, 1957, s.52. The section uses the term ‘fair dealing’ but does not prescribe any factors to determine whether the reproduction/copy amounts to fair dealing or not. The judiciary has dealt with the matter on case to case basis; See also, Lord Denning in *Hubbard v. Vorper* (1972) 20.08.84 (C.A.).

to the above stated dilemmas and problems have been one of the most difficult issues facing the copyright owner community. In 1975, a working group was set up jointly by the Inter Government Copyright Committee of the Universal Copyright Convention, which was administered by UNESCO, and by the Executive Committee of the Berne Union, which was administered by WIPO. The working group concluded that a uniform solution on the international level cannot, for the time being, be found but recommended that national solutions be based on two principles:<sup>12</sup>

- 1) “each of the States should establish whatever is best adapted to their education, cultural, social and economic development in order to assure the protection of the economic interests of copyright owners under the convention, and
- 2) States where reprography is widespread should consider among other measures, encouraging the establishment of collective systems to exercise and administer the right of remuneration”.

Later, in accordance with the programme of WIPO for the 1990-1991 biennium a committee of experts was convened from November 4-8, 1991<sup>13</sup> to examine questions concerning a possible protocol to the Berne Convention for the Protection of Literary and Artistic Works. The protocol was mainly destined to clarify the existing and establishing new international norms where, under the present text of the Berne Convention, doubts existed as to the extent to which that convention applied. The second session of the Committee was held at Geneva from February 10-17, 1992.<sup>14</sup> The report which was adopted finally, after detailed deliberations, by the Committee proposed that the possible protocol should not include any detailed provisions on reprographic reproduction as article 9(2) of the Berne Convention was an appropriate basis for national laws to regulate possible exceptions in respect of reprographic reproduction which states:

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 authors.

The director general proposed that the discussions should be terminated as consensus did not emerge among delegates and question of reprographic

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12. Report of the Sub Committee of the Executive Committee of the International Union for the Protection of Literary and Artistic Works and the Sub-committee of the Intergovernmental Copyright Committee on Reprographic Reproduction (Washington DC, July 1975).

13 Document AB/XX/2, Annex A, item P.R.G. 02(2).

14 *Ibid.* experts from 38 states attended the meeting; experts from eight states participated in observer capacity, representative of five intergovernmental organizations, participated in an observer capacity.

reproduction should be taken off the agenda, and the search for new solutions should continue at the national level.<sup>15</sup> The delegates to the director general's proposals expressed no opposition. In fact, after the above mentioned decisions some delegates stated that although they had accepted the decision, they would be in favour of continuation of considering the questions of reprographic reproduction in the framework of further WIPO activities with the purpose of establishing at least certain guidelines and later, possible guiding rules, so that certain overly extensive interpretation of article 9(2) could be avoided.

The later sessions of the committee meetings, however, did not deliberate on the aspect of reprographic reproduction and the same did not, therefore, find any mention in the WIPO Copyright Treaty, 1996 which is a special agreement within the meaning of article 20 of the Berne Convention for the protection of literary and artistic works as regards contracting parties that are countries of the union established by the convention.<sup>16</sup>

Since the international efforts have left the matter of right of reproduction of copyright owners *vis-a-vis* the reprographic reproduction to the domestic legislation of the states, it becomes pertinent to discuss various solutions reached at national levels.

### III National efforts: some general principles.

Photocopying machinery had made individual control of the creator's right of reproduction impossible as the infringers were too many for the copyright owners. Collective control and reward through collecting societies became not just desirable but necessary in such a situation.<sup>17</sup> Since the right of reproduction is an exclusive right of the author, it was natural for states to establish collective administration of reprographic reproduction rights on voluntary basis.<sup>18</sup>

#### Collective management organizations

Collective administration of rights is considered the best possible solution whenever the individual exercise of rights is found to be impracticable or impossible.

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15. Normative Activities of WIPO in the Field of Copyright, Committee of Experts on a possible Protocol to the Berne Convention 69 (Feb. 10-17, 1992).

16. WIPO Copyright Treaty, 1996, Art. 1.

17. International Federation of Reproduction Rights Organizations, "General Papers, Collective Administration", available at: <file:///A:/IFFRO%20%20Detailed%20Papers.htm> (last visited on Aug. 19, 2012); see also S.M. Stewart, *International Copyright and Neighbouring Rights* (Butterworths 1989 2nd Ed.); W.R. Cornish, *Intellectual Property* (Sweet and Maxwell 2nd ed. 1993); Gerald Dworkin, *Blackston's Guide to the Copyright, Patents and Designs Act, 1988* (London:Blackstone Press Ltd, 1989); Copinger and Skone James, *Copinger on Copyright* (Sweet and Maxwell 13th ed. 1991).

18. Tarja Koskinen Olsson, "Copyright Reprography and Digital Use" WIPO-Sweden Training Course on Copyright and Neighbouring Rights, Stockholm (Aug. 21-29, 2000).

A collective administration organization can only administer the rights of its members, *i.e.* the rights of those who have given the organization a mandate to act on their behalf. Such an organization dealing with rights of authors of literary and artistic works and reprography are called Reprographic Reproduction Organizations (hereinafter referred to as RROs). RROs license reproduction right, making available the distribution rights, ordinary photocopying, making works available on intranets, internet downloads, digital copying *etc.* on behalf of creators and publishers. The licenses typically allow the users to copy a portion of a publication in a limited number of copies for the internal use of institutional bodies, the construction of course packs in universities, the provision of press cuttings in governing bodies *etc.* The RROs deduct a specified percentage from the fees paid by users of work to meet their administrative costs.

An argument, which is sometimes advanced against collective administration, is that the administrative costs involved are too high and that as a consequence too small a portion of the amount paid by the users finds its way into the pockets of the right owners.<sup>19</sup> Those who advance this argument frequently overlook that in the absence of collective administration, the transactional costs involved in users having to seek out and deal with individual right owners are likely to be considerably higher than the costs of collective administration. The concerned right owners are able to deal with this problem by making collective administration society accountable to its members *i.e.* the copyright owners.

There are more than 70 RROs around the world who are members of International Federation of Reproduction Rights Organization (hereinafter referred to as IFFRO).<sup>20</sup> All types of RROs have been able to achieve substantial earnings, to the benefit of authors and publishers around the world. Thus, establishment of an RRO provides an important support mechanism for the implementation of national copyright legislation and increase the earnings of copyright holders thus encouraging and supporting their creative output.

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19. S.M. Stewart, *International Copyright and Neighbouring Rights* (Butterworths 1989 2nd ed.).

20. IFFRO links national RROs (member as well as national and international associations of right owners) IFFRO has three primary purposes: 1) to foster the creation of RROs worldwide, 2) to facilitate formal and informal agreements between RROs, authors etc., 3) to increase public and institutional awareness of copyright and the role of RROs. Most collecting organizations at an international level are affiliated with one of the four umbrella organization: 1) IFFRO; 2) CISAC, the Confederation International des societies Auteurs et Compositeurs, which has ties with over 140 collecting organizations representing a wide range of copyrighted works 3) BIEM, the Bureau International des societies Gerant les Droits d' Enregistrement et de Reproduction Mechanique – to administer recording and mechanical reproduction rights. 4) IFPI, the International Federation of Phonogram and Videogram Producers. See IFFRO 'IFFRO General Papers', See also Paul Goldstein, *International Copyright Principles Law, and Practice* 229 (Oxford University Press, 2001).

*Distribution of revenue by collective management organizations*

Education is a good cause but it cannot be the reason for depriving copyright owners of remuneration. A literary piece of work, a well-researched article, an informative book *etc.* render a service to the society for which a right arises in the author to receive a fair price for his services from the society. The first premise that is accepted is that the author should be paid for mass uses of his works. But, care has to be taken that any system of remuneration should not disrupt the free flow of information and ideas in the society.

The basic questions before any RRO are:

- 1) How much is to be paid to the authors?
- 2) For what uses of works the payment has to be made?
- 3) How is the system of collective administration to be enforced?

For quantum of payment, a basic premise, which is adopted, is that the remuneration to the author is the compensation for the benefit drawn by society from author's work. Rates of remuneration reflect this philosophy. Remuneration to authors generally depends upon the actual use of their works. The actual use can be determined by various methods:

- a) Full Reporting Method: Most of the licensing schemes in USA use this system where the users record details of all copyrighted work used by them.
- b) Sampling method: Defined users report their actual use at agreed intervals. For example in Denmark 5% of all schools regularly report their copying to local RRO called Copy Dan.
- c) Fixed Rates of royalty paid to different authors of copyrighted work irrespective of actual use.

Since all material existing in the market can be copied, the assumption is made in some countries that at some stage it probably will be copied. The principle of objective availability, *i.e.* "availability on the market" can, therefore, form a basis for individual distribution, as is the practice in Germany. Authors and publishers report their publication to the local RRO and receive their share of the distribution accordingly.

In Norway, Finland and Sweden, fees are distributed for the collective purposes of right holders. This is the solution, which the right holders themselves have chosen. It applies only to the right holders represented by the organization in the country concerned.

The participation of authors and publishers in the collective administration of reprographic reproduction rights is fundamental. Different approaches exist. In some countries the division of remuneration between authors and publishers is regulated by legislation. In other countries the statutes or rules of the RRO regulate it. A fifty-fifty division is the most common.

The traditional approach in common law countries allows authors and publishers to order their own affairs through individual contracts. For example, in the United States individual authors and publishers decide on the division of royalties for each type of work. In some countries there is no single objective basis for the split of remuneration between authors and publisher, therefore, such division is decided by arbitration or an equivalent procedure.

### Licensing systems

A number of different licensing systems exist throughout the world. In some countries rights clearance centers are set up for grant of licenses to users. The licenses reflect the conditions for the use of works and the remuneration terms set by each individual holder of rights, who is a member of the center, *i.e.* the authors of written works such as books, magazines and periodicals in case of reprography. In this case the center acts as an agent for the owner of the rights who remains directly involved in setting the terms of use of his works.<sup>21</sup> A detailed analysis of the different licensing systems in operation is given below.<sup>22</sup>

#### *Non-voluntary licensing – blanket or legal licenses*

In non-voluntary licensing systems no authorization from the right holders is needed. Permission to copy is granted by law, hence the name “legal license”. If the royalty rate is determined by the legislation the system is called “a statutory license”. If right holders can negotiate the royalty rate with the users (although they are not able to refuse authorization), the term “compulsory license” is used. These licenses enable students or employees to copy, within limits, without having to ask for prior authorization and yet remain within the law.

In Netherlands,<sup>23</sup> *Stichting Reprorecht* (hereinafter referred to as *SR*), currently administers a non-voluntary licensing system for reprographic reproduction rights, principally in the educational and government sectors. Dutch law grants a legal license to users in those sectors to copy small parts of printed works. The royalty fee is established by government regulation.

*SR* is authorized to collect and distribute the remuneration. Statistical surveys are carried out to determine the quantities of copyright-protected works being copied by different category of users. These statistical surveys also provide the information needed by *SR* to make distributions to authors and publishers. The split between

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21. “Collective management of Copyright and Related Rights”, *available at*: <<http://www.wipo.int>> (last visited on Aug. 19, 2012).

22. IFFRO, IFFRO Detailed Papers, Different Models of RRO Operations in Practice, *available at*:[file:///A:/IIFPRO%20%20Detailed % 20 Papers.html](file:///A:/IIFPRO%20%20Detailed%20Papers.html)(last visited on Oct. 22, 2012).

23. *Ibid.*





authors and publishers is also determined by government regulation. In recent years there has been an attempt to extend the legal license in the Netherland to cover trade and industry also.

*Voluntary licensing with extended collective license*

*Prima facie*, a collective administration organization can only administer the rights of those who mandate it to do so. However, it is impossible for an organization to obtain mandates from all national and international right holders whose works are reproduced in its territory of operation. There are different legal techniques which support collective administration and make it possible that the licenses used by the copyright organization also cover the rights of non-represented right holders.<sup>24</sup>

The characteristics of an extended collective license are:

- The copyright organization and the user conclude an agreement on the basis of free negotiations.
- The copyright organization must be nationally represented.
- Law makes certain agreements binding on non-represented right holders.
- The user may legally use all materials, without needing to meet individual claims by outsiders or having to face criminal sanctions
- Non-represented right holders have a right to individual remuneration.
- In most cases, non-represented right holders have a right to prohibit the use of their works.

Under the extended collective license system, distribution methods can and do vary. In most of the Nordic countries, remuneration is distributed for collective purposes, a method of distribution chosen by the represented right holders themselves. Non-represented right holders always have a legal right to individual remuneration individually on a title-specific basis.

In 1995, a legislation in France introduced for the first time the concept of obligatory collective management into the administration of reprographic reproduction rights, which are based on exclusive rights and voluntary licensing. Even though the administration of rights is voluntary, right holders are legally obliged to make claims only through a collective administration organization. This safeguards the position of users because an outsider cannot make direct claims against him. In France, agreements with users can only be concluded by a society approved by the ministry of culture.

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24. See for example Norwegian Copyright Act, 1961 amended in 1979 and 1995. It provides for extended collective licence system for reprography in education, public administration, businesses and organizations, available at: [www.kopinor.no/en/copyright/extended-collective-licence](http://www.kopinor.no/en/copyright/extended-collective-licence) (last visited on Oct. 10, 2012).



In the Anglo-American (common law) tradition licensing is based on voluntary contracts. RROs ordinarily obtain their licensing authority from mandates given by individual right holders. In some countries, for example, the United Kingdom, Canada and New Zealand, there are statutory provisions that encourage users and right holders to enter into such voluntary agreements.

In other common law countries such as the United States there is no particular statutory involvement and management of licensing is governed by contracts and voluntary cooperation.

### Equipment levy system

The equipment levy approach is based on the notion that remuneration is payable for all uses of copyright material, but that single copies for private and personal use cannot be tracked. Payment for this type of copying is made possible by imposing a levy on equipment. In Germany however, the courts have been liberal and interpreted “single copies” and “personal use” to include seven copies.

The introduction of a levy system was considered in many countries around the world. This issue was discussed at the first African Regional Workshop on Reprography, which was organized in 1995 by WIPO, IFRRO and the Nigerian government and had participants from 14 African states. The final communiqué called on African countries to introduce “appropriate levies on equipment and materials capable of being used for reprographic infringements”. The Nigerian Copyright Act provided for such a levy in 1992.

The first country to introduce this kind of levy system on equipment was Germany, in 1985.<sup>25</sup> The levy is paid on copying and fax machines, reader printers and scanners, CDs, DVDs *etc.* The manufacturer or importer of the equipment pays a levy. In addition to this, a so-called “operator levy” is paid by large-scale users, such as schools, universities, research institutes (the so called copy shops).

The German RRO, *Verwertungsgesellschaft WORT (VG WORT)* collects the levy on behalf of all authors and publishers of different types of materials. Distribution of revenue is carried out by organisations like *VG WORT*, *VG Bild-kunsti* and *VG MUSIKEDITION*.

The question of unauthorized photocopying and monetarily compensating the authors evoked a great deal of discussion in India also. As a result, Copyright (Second Amendment) Bill, 1992 and Copyright Cess Bill, 1992 were introduced in the Lok Sabha. The latter was passed as being complementary to the former which had sought to amend the provisions of the Copyright Act, 1957 in order to make provisions for payment of remuneration to the owner of rights where reproduction of works was done by reprographic equipment or by means of devices such as tape

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25. S.M. Stewart, *supra* note 19 at 429.



recorders and cassette recorders and where such reproduction would not under the existing laws amount to infringement. The Parliament passed the Copyright (Amendment) Act, 1994 but the Copyright Cess Bill, 1992 lapsed.

Copyright Cess Bill, 1992 proposed to levy<sup>26</sup> and collect by way of cess for the purposes of Copyright Act a duty of excise on copying equipment in addition to excise duty liable on equipment under the Central Excises and Salt Act, 1944. Similarly, it proposed to levy and collect customs duty on imported copyright equipment in addition to customs duty leviable under Customs Act, 1992.<sup>27</sup> Clause 5 provided that the proceeds of excise and customs duty collected under section 3 and 4 shall be credited to the Consolidated Fund of India. The Central Government, may then, if Parliament by law so prescribed, pay to the copyright society from time to time out of such proceeds for being utilized for the purposes of the Copyright Act. Section 33A further provided that Central Government may appoint a copyright society for the purposes of framing a scheme for determining the quantum of remuneration payable to individual copyright owners having regard to the number of copies of work in circulation.

#### IV National efforts: some specific examples

##### United Kingdom

The Whitford Committee while dealing with the problems of reprography recommended that there should be a collective licensing scheme operated by rights owners,<sup>28</sup> Copyright Licensing Agency<sup>29</sup> (CLA) was established in the UK in 1982 and is the officially recognized body under the statutory provisions.<sup>30</sup> CLA began operating in the educational sector, offering blanket licenses for schools for a negotiated annual fee. CLA subsequently extended its activities to cover higher education, government and business. CLA is engaged also in transactional licensing schemes with industrial organizations. The UK Copyright Designs and Patents Act 1988 sets out to facilitate the development of licensing schemes.

In United Kingdom until recent years authors and publishers mainly relied on the tactics of persuasion to encourage educational users to respect copyright and to seek licenses. The Act of 1988 provides positive encouragement to the creation of

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26. See Copyright Cell Bill, 1992, cl. 3.

27. *Id.*, cl. 4.

28. Whitford Committee Report, at 71.

29. Now UK there are around 20 collecting societies for various rights. Available at: [www.calson.com.au/colsocieties/profile3.htm](http://www.calson.com.au/colsocieties/profile3.htm) (last visited on Oct. 10, 2012).

30. Dworkin Gerald and Richard D. Taylor, *Blackstone's Guide to the Copyright, Designs and Patents Act*. 170 (Blackstone Press Ltd., 1988).



licensing schemes. Thus, reprographic copying by educational establishments of passages from published works may be made for the purposes of instruction only within very narrow limits. For example multiple copies of up to 1% of published literary, dramatic or musical (but not artistic) work to be made in any one quarter of the year by an educational establishment for the purposes of instruction.<sup>31</sup> This permission is not applicable if licenses are available authorizing the copyright in question and the person making the copies know or ought to have been aware of that fact. The terms of a license granted to an educational establishment authorizing the reprographic copying for the purposes of instruction of passages from published, literary, dramatic musical works are of no effect so far as they support to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted under this section. Licenses are likely to be available for virtually all works in particular classes since there is an obligation on the licensing body to indemnify licences against infringement actions in relation to their photocopying works within the apparent scope of the license. The secretary of the state has the power to ensure that certain works which are not within the scheme do come within it.<sup>32</sup>

CLA has bilateral agreements with 31 countries to ensure that when British published works are copied abroad, the money comes back to UK.<sup>33</sup> CLA has such an agreement with IRRO of India also.

### United States of America

In the United States collective licensing through the national RRO, copyright clearance center (CCC) is based solely on non-exclusive contracts. Authors and publishers determine which works are to be included in different licensing programmes.

User licenses are of two types. “Blanket” licenses permit the user to make unlimited numbers of copies of parts of all works in the licensed repertoire for payment of a single annual fee. The fee is determined by the RRO on the basis of statistical surveys of licensees’ actual copying, aggregated data on copying within particular license sectors, and sector fee levels set by a committee of right holders.

In “transactional” licenses, copy-by-copy tracking of all copies takes places and each individual right holder sets the fees for copying of individual works. A right holder can, therefore, set different fees for different works and for different uses.

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31. UK Act of 1988, s. 36.

32. *Id.*, s. 136, 137.

33. PLS Knowledge base, *available at*: [kb.pls.org.uk/articles/wiki](http://kb.pls.org.uk/articles/wiki) (last visited on Oct. 22, 2012).

Although voluntary licensing systems require considerable marketing effort as well as comprehensive computer systems, their flexibility makes them attractive to individual right holders. In the United States, investment in the establishment of voluntary systems has begun to generate significant returns for authors and publishers. Establishment of an RRO provides an important support mechanism for the implementation of national copyright legislation and increase the earnings of national right holders, thus encouraging and supporting their creative output.

## V Copyright law and photostat in India

### Rights of copyright owner

The copyright owner has the exclusive right to authorize the reproduction of his work by virtue of section 14 of ICA, 1957. The right of reproduction, though essential and basic, is not absolute as certain reproduction/copy/usage of copyright work, without the authorization of the author are permissible under section 52. This is commonly referred to as the fair dealing provision.

### Limitation on the right of copyright owners

Some acts which do not constitute infringement, under the ICA, 1957, *inter alia*, are:

- i) A fair dealing with literary work for the purpose of-
  - a. Personal or private use, including research.
  - b. Criticism or review, whether of that work or of any other work.<sup>34</sup>
- ii) The reproduction of a literary work by a teacher or a pupil in the course of instruction.<sup>35</sup>
- iii) The making of not more than three copies of a book by or under the direction of the person in charge of a public library for the use of the library if such book is not available for sale in India.<sup>36</sup>

The students, teachers and researchers have been indulging in photostatting of books, periodicals, journals in the garb of 'fair dealing' provisions. The photostatting has become so rampant and accepted in educational institutions that every college, school or university provides premises for installation of photostat machines. The pertinent question is: Is reproduction by means of photocopying in educational institutions permissible by law? If yes, then how much of copyright material can be reproduced or copied, without the authorization of copyright owner, under 'fair dealing' provision?

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34. S. 52(1) (a).

35. S.52(1)(h).

36. S. 52(1)(o).

### Copyright management organization in India.

Section 33(3) of ICA, 1957, provides for registration of copyright societies for carrying on the business of issuing or granting licences in respect of any work in which copyright subsists. Indian Reprographic Rights Organization (IRRO) was registered in the year 2000 for granting reprographic and digital licences on behalf of its members namely, authors and publishers. Rules of IRRO mandate all corporate bodies, reprography shops, libraries, educational institution *etc.* to take “reprographic usage” licences from IRRO on payment of prescribed tariff. IRRO provides for two kinds of licences: blanket and transactional.

The IRRO remained dormant and inoperative since its inception in the year 2000. Various institutions were, therefore, not taking any licence from IRRO for carrying out reproduction/copy of copyright material.<sup>37</sup> The Secretary General of IRRO in fact commented on August, 2012, after the raid in University of Delhi, “We have been giving licences for the last two months but, not a single University or college has taken a licence so far. Only a few corporate houses have. Last week, we asked all universities to take licences so that students and Photostat venders don’t face problems”<sup>38</sup>

### Constitutional validity of sections 33 and 34 of ICA,1957

The constitutional validity of sections 33(3) and 34 of ICA,1957, was challenged in *Federation of Hotels and Restaurant Association of India v. UOI*.<sup>39</sup> It was contended that section 34 is unconstitutional as it bestows uncontrolled, unregulated and unbridled power on copyright societies with regard to issuance of licences to various bodies and organizations, collecting fees in pursuance of such licences and distributing such fees among owners of these rights. The instant case dealt with music societies namely, Indian Performing Rights Society (IPRS) and Phonogram Producers Limited (PPL). It was contended that section 33 creates monopoly in favour of societies registered by copyright owners and that because of the monopoly granted to such societies, they hold the consumers to ransom by charging exorbitant fees. The court held that sections 33 and 34 are constitutional as the broadcast or dissemination of music to public at large is neither a statutory responsibility nor a duty of a public character. The copyright and performing societies like IPRS/PPL are an amalgamation of conglomeration of individuals/owners who are fully entitled

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37. *Supra* note 3.

38. *Ibid.*

39. 2011 (46) PTC 169 (Del) DB.

to claim the highest premium for enjoyment of the fruit of their labour or intellect, subject to any statutory restraint imposed by the Parliament.

The Delhi High Court, thereafter, in *Event and Entertainment Management v. UOI*<sup>40</sup> reiterated that the legislative provisions are constitutional and not suffering from the vice of excessive delegation.

It is humbly submitted that the above two decision of Delhi High Court cannot apply *mutatis mutandis* to IRRO and the tariff scheme formulated by it, especially in case of photostatting of copyright material for educational and research purposes and the licence fee structure imposed on educational institutions. The three prime reasons for the above stated submission are: *First*, the right of reproduction of literary works is not an absolute but a limited right. The law permits fair dealing with the work for educational and research purposes. *Second*, providing of educational tools like extracts of books, articles *etc.* to students is a duty of a public nature and cannot be deemed to be a private duty. *Third*, IRRO can be classified as a different class as it deals with end users engaged in ‘education’ and ‘educational and research institutions’ contrary to IPRS and PPL that deal with ‘entertainment’ purely.

### **Tariff scheme of IRRO: arbitrary and unfair**

A glance at the tariff scheme<sup>41</sup> formulated by IRRO shows that it is arbitrary unfair and unreasonable and substantively *ultra vires* the ICA, 1957. Some examples of arbitrariness and unreasonable tariff are given below:

*IRRO Rules provide :*

Tariffs detail for Government AEE: Government Financially Aided educational establishments registered by the Government, such as:

A	Schools: Play School, Nursery, Pre-Primary, Primary, Secondary and Special Schools	Rs.12,000/-per school per annum
B	Colleges: Colleges (Higher Secondary, Graduate and Post Graduate Courses), Universities, and Vocational training educational Establishments Including Poly technics like ITI	Rs.24,000/-per institution per annum
C	Professional Courses: Engineering, Management, Medical Colleges or Institutes and the like Professional Courses.	Rs.48,000/-per institution per annum

It is a known fact that most of the higher secondary schools are registered under some board like Central Board of Secondary Education where the study and

40. 2011 (46) PTC 405 (Del.).

41. Available at: [www.irro.in/](http://www.irro.in/) (last visited on Oct. 10, 2012).



exam pattern is prescribed and books are available at subsidized rates. The photostat requirement from copyright material for school students is negligible as compared to a post graduate student who has to take material for study, from innumerable ‘required’ and ‘recommended’ readings provided by its institution. The books are generally highly priced and therefore, photostat turns out to be cheaper for a PG student. PG students thus opt for photostat rather than buying of books. Same tariff rates for schools and PG institution is, therefore, arbitrary, unfair and unreasonable. The best course for an organisation like Delhi University will be to file an appeal to the Copyright Board under section 33A inserted by the Amendment Act of 2012. complaining that the tariff scheme of IRRO is arbitrary, unreasonable, discriminatory and inconsistent

Further, what will be the position in case of a medical college in a university? Will the university pay Rs. 24,000 per annum for the medical college or Rs. 24,000+Rs. 48,000 =72,000 per annum? Is the fee reasonable or exorbitant? Should the fee in some form be related to the number of students in an institution, especially in India, where one institution has an intake of hundred students whereas the other may have in varying multiples of hundred? If a government financially aided university has large number of colleges recognized under it, will it not go bankrupt paying separately for each institution irrespective of its photostat requirement and hence make IRRO a rich body? The university will receive subsidy for education from government in order to make arbitrary and exorbitant payments to IRRO !!!

Taking another example of libraries:

Libraries (Run by Associations/ Chambers of Commerce/ Councils/ Autonomous establishments and paying Blanket License Royalty) like CII / FICCI / Departments of Embassies etc.	Rs.120/- per person per annum + (plus) Rs.1000/-per Corporate member per annum
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It seems the IRRO has prescribed rates for collection of revenue without any relevant basis. In organization like FICCI and CII there are different kinds of staff having different requirements. The staff ranges from secretariat, research divisions, exhibitors, security, peons, workers *etc.* Any reasonable man can comment that most of the staff would have never made use of library or photostatted material for research purposes. If this is the case then why should they be mandated to pay Rs. 120/- per person? The matter does not terminate here as FICCI and CII have further to pay Rs. 1000/ per corporate member per annum. The corporate members work in their respective offices and premises and not in the office of the two respective chambers. The rationale of charging FICCI and CII libraries for corporate members defies logic.



## VI Conclusion and Solutions

Most of the students in higher education depend upon libraries for literature, where either they sit and study or get books on loan or get the relevant material photocopied. Photostatting turns out to be cheaper for students than buying of books of high quality, which are generally very costly, especially in the field of science, technology, law and other professional studies.

In India, there is no official report giving the extent and kind of photocopying activity taking place outside in the open market place, data is often not readily available to help in estimating the extent of photocopying. In fact, an accurate quantitative estimate of photocopying of copyright material cannot be made for several reasons:<sup>42</sup>

- a) Not all copied material is copyrighted being in public domain.
- b) There are thousands of copying machines in universities, colleges, public libraries, schools of all kinds *etc.*
- c) The logistics of getting a count of every copy made by every copying machine is beyond human ability.

In India solutions to the problems posed by reprography on the right of reproduction of authors should be formulated only after a thorough consideration of the practical circumstances like poor economic background of copiers *i.e.* the students and researchers,<sup>43</sup> the need of a developing country in having more information,<sup>44</sup> the kind of material which is photostatted,<sup>45</sup> the category and the number of users of such material,<sup>46</sup> *etc.* The magnitude of these practical problems along with the efforts undertaken at international and national levels has to be studied before devising an economic, fair and workable system for collection and distribution of royalties which would compensate individual owners of copyright in relation to the extent to which their works are copied. This work should be taken up by the IRRO in consultation with the authors, publishers, association of libraries, photostat machine operators, and some users chosen by method of sampling. In the year 2000 Indian Reprographic Reproduction Organization (IRRO) was given a statutory registration by the Ministry of Human Resource Development, as a copyright society under section 33(3) of the ICA, 1957.<sup>47</sup> It grants reprographic and digital licenses on behalf of its member authors and publishers.

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42. William Z. Nasri, *Crisis in Copyright* (Maveel Dekker Inc. 1976).

43. Price of books of high quality or books of foreign authors especially in the field of law, science medicine *etc.* remain beyond the buying capacity of students.

44. India has largest number of illiterates in the world, 48% of Indian population is illiterate.

45. For example, fiction, non-fiction, test books, articles, reports – government or private *etc.*

46. Whether users are students, researchers, teachers, library, corporate houses *etc.*

47. Available at: [www.iffro.org/members/indian-reprographic-rights-organization](http://www.iffro.org/members/indian-reprographic-rights-organization) (last visited on Oct. 22, 2012).



In spite of the existence of IRRO, uncontrolled photocopying has become a part and parcel of the higher educational institutions. A jolt to the 'taken for granted practice of photocopy' came when three publishers filed a suit for copyright infringement against the defendants, a photocopy shop and University of Delhi. All the three publishers are members of IRRO and had authorized it to grant licenses for fee.

The members of the copyright society, rather than making an arbitrary scheme, should formulate a fair and a reasonable scheme for remuneration to copyright owners and for this purpose they should take into consideration the following factors:

1. Quantum of mass reproduction of works - This can be determined by asking the copier to fill up a small simple form containing the name of the author, title of the book and page numbers to be copied.
2. Who should pay and how much should be paid? - The government should lay down the floor and the ceiling limits so that neither the authors nor the users can ask for undue and unreasonable amounts.
3. Scheme of remuneration - Distribution of remuneration to authors should be worked out after deducting the administration costs by the copyright society.
4. Mediation Body - A body can be set up which can mediate between authors and users as the Royalty Copyright Tribunal in Austria, Federal Republic of Germany and Switzerland.

The Copyright Act in India should provide for photocopying in general terms subject to limitations and conditions that need to be prescribed by administrative regulations. Administrative regulation is preferred to legislative amendment as the former can keep pace with the technological developments in a better and faster way rather than the latter. Moreover, administrative authorities can easily come in direct contact with manufacturers of photocopy machines, operators and users and can continuously monitor the advantages and disadvantages of photocopying.

The Government of India can also encourage the libraries, publishers and other groups concerned to develop a working arrangement to maintain an equitable balance between authors and users of information. The library associations should get together and work on drafting a 'Reproduction of Material Code' which should specify the policy for determining as to whether any act of copying is 'fair dealing' in consultation with authors and users *i.e.* research organizations, educational and professional institutions.<sup>48</sup> The assistance can also be sought from non government organizations (NGOs) who are actively involved in developmental programmes such as: education, research, scientific and development *etc.* for this purpose. This code should act as a guideline for authors and users of information.

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48. See Copyright (Librarians and Archivists) (Copying or Copyright Material) Regulations 1989 of UK.



The IRRO cannot frame a scheme which is *ultra vires* the rationale of ICA,1957. The rationale is to create a balance between the creators of knowledge and their users. The balance between the private and public rights has to be maintained in order to have growth in a developing nation like India.

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