Indian Law Review

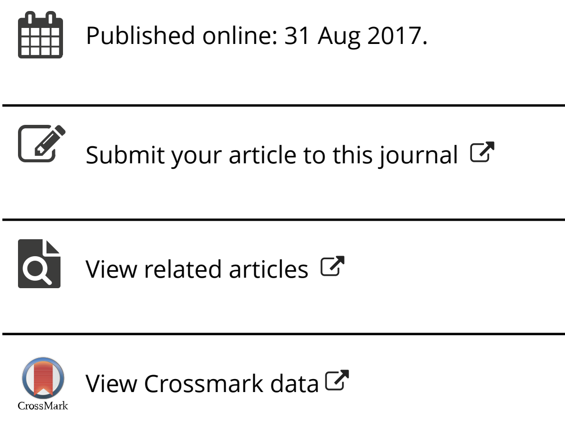
ISSN: 2473-0580 (Print) 2473-0599 (Online) Journal homepage: http://www.tandfonline.com/loi/rilw20

Paternal and defiant access: copyright and the politics of access to knowledge in the Delhi University photocopy case

Lawrence Liang

To cite this article: Lawrence Liang (2017) Paternal and defiant access: copyright and the politics of access to knowledge in the Delhi University photocopy case, Indian Law Review, 1:1, 36-55

To link to this article: http://dx.doi.org/10.1080/24730580.2017.1364477



Published online: 31 Aug 2017.

Submit your article to this journal

View related articles

View Crossmark data

Full Terms & Conditions of access and use can be found at
http://www.tandfonline.com/action/journalInformation?journalCode=rilw20

Download by: [Yale University] **Date:** 04 September 2017, At: 12:00

INDIAN LAW REVIEW, 2017
VOL. 1, NO. 1, 36–55
https://doi.org/10.1080/24730580.2017.1364477

RESEARCH ARTICLE

Paternal and defiant access: copyright and the politics of access to knowledge in the Delhi University photocopy case

Lawrence Liang

Department of Law, Ambedkar University Delhi, Delhi, India

ABSTRACT

This article examines the two decisions of the Delhi High Court in *Chancellor, Masters & Scholars of The University of Oxford & Ors* v. *Rameshwari Photocopy Services*. It argues that the significance of the two decisions lies in their foregrounding of the language of access as a central normative principle underlying copyright. While the first half of the paper examines the doctrinal basis of claims of access in copyright law, the second half of the comment proceeds to critically evaluate the limits of legal claims of access by distinguishing between two forms of access – paternal and defiant access, especially in the context of the political economy of information and knowledge goods.

ARTICLE HISTORY
Received 3 August 2017
Accepted 3 August 2017

KEYWORDS
Copyright; fair dealing; access to knowledge; Delhi University; photocopy; right to education; course packs

Downloaded by [Yale University] at 12:00 04 September 2017

1. Introduction

Amongst the plethora of words that Shakespeare contributed to the English language there is perhaps none as pertinent for understanding judicial interpretation as the word "circummured". It appears in the legal universe of Measure for Measure[1] – a play itself about fairness, justice and balance – and Shakespeare used the word to depict a world that had been claustrophobically walled in, one in which justice is straitjacketed by excessive formalism. It is a reminder that for legal interpretation to do justice, it needs to have some breathing room. It helps to set the tone for the ensuing analysis of the two decisions of the Delhi High Court in the Delhi University (DU) photocopy case, which considered whether university departments can authorize the creation of course packs consisting of photocopied excerpts from copyright-protected works.[2] The Copyright Act 1957 (Copyright Act) provides for a limitation in Section 52(1)(i)(i), which permits the unauthorized reproduction of protected works "by a teacher or pupil in the course of instruction". The dispute ultimately turned on the interpretation of this provision. While the publishing houses who were the petitioners had proposed a narrow interpretation that would benefit owners of copyright, both the single judge bench and the division bench rejected this approach. The two decisions collectively constitute a significant contribution to a jurisprudence of access, which can serve as a benchmark both in India and beyond, when interpreting national copyright legislation.

CONTACT Lawrence Liang lawrence@aud.ac.in Department of Law, Ambedkar University Delhi

[1]W. Shakespeare, *Measure for Measure* (1604), Act IV, Scene 1 <http://www.opensourceshakespeare.org> accessed 30 June 2017.

[2]*The Chancellor, Masters & Scholars of The University of Oxford & Ors* v. *Rameshwari Photocopy Services & Anr*. 2016 (68) PTC 386 (Del) (Endlaw J) (Hereafter, *Delhi HC*); affirmed in relevant parts on appeal 2017 (69) PTC 123 (Del) (Nandrajog and Khanna JJ) (Hereafter, *Delhi DB*) in September 2016.

© 2017 Informa UK Limited, trading as Taylor & Francis Group

Justice Endlaw dismissed the petition in its entirety on the basis that no question of copyright infringement arose. According to Section 52(1)(i)(i) the reproduction of protected works in the course of instruction was outside the ambit of the infringement provisions in Section 51. The issue of whether the preparation of course packs was "in the course of instruction" was decided as a question of law, which did not warrant a trial. On appeal the division bench largely affirmed the single bench approach to this question of law, but remanded the matter to Justice Endlaw for a fact-specific determination as to whether the copyrighted materials included in the course packs were in fact necessary for the purpose of instructional use by teachers.[3] At this stage, the publishers decided in March 2017 to not prefer an appeal to the Supreme Court. In a joint statement, Oxford University Press, Cambridge University Press and Taylor & Francis acknowledged the importance of course packs for education and stated that rather than continue the legal battle they would "work closely with academic institutions, teachers and students to understand and address their needs".[4] The Indian Reprographic Rights Organization (IRRO)[5] did appeal, but a division bench of the Supreme Court[6] refused to admit the appeal since the original petitioners had withdrawn while IRRO were merely interveners.

This keenly contested case had generated immense public interest and debated, while sharply dividing opinions as to what constitutes an equitable system of copyright in the sphere of education. With the dust having settled, the two decisions can be usefully evaluated for their broader relevance as regards future disputes about copyright and access to knowledge (A2K).

While the initial dispute pitted the publishers against DU and the photocopying shop producing course packs on its behalf, subsequently other interested parties joined the dispute. By the time of the division bench appeal, the three publishers had been joined by the Association of Publishers in India, the Federation of Indian Publishers and the IRRO (mentioned above). Before the single bench, two other associations had impleaded themselves as defendants: the Society for Promoting Educational Access and Knowledge (SPEAK) and the Association of Students for Equitable Access to Knowledge (ASEAK) consisting of academics and students, respectively. It is worth noting that formal legal proceedings were preceded by innovative activism, by a diverse set of players with varied interests in the case. If for the publishers this was an important test case that would determine the scope of the educational use exception in copyright law and establish whether universities are bound to obtain a license from reprographic societies to create course packs, for academics and students it implicated the future of equitable A2K.

The global interest in the case was also understandable coming as it did in the wake of a decade of activism around the idea of A2K[7]. In her intellectual genealogy of the

[3]A further issue remanded for trial was whether the eight complete or "back-to-back" photocopies of books found on Rameshwari's premises were permissible under Section 52. *Delhi DB* at [79]. The purposive test proposed by the courts would in principle accommodate the reproduction of complete works as well.

[4]Joint Statement by Oxford University Press, Cambridge University Press and Taylor & Francis, 9 March 2017. <http://fdslive.oup.com/asiaed/News%20Items%20and%20Images/Joint%20Public%20Statement.pdf> accessed 30 June 2017.

[5]A copyright society which collectively represents the rights owners of literary works and issues annual licenses to make certain uses of them.

[6]*Indian Reprographic Rights Organisation* v. *Rameshwari Photocopy Service & Ors*, CC Nos 9194/2017 (Supreme Court, 9 May 2017) (Gogoi and Sinha JJ).

[7]There is no single definition of A2K, but one strand of the argument attempts to distinguish it from the broader claims of access to all forms of knowledge including primary schooling, so on, and tries to locate the term within the ambit of restrictions put in place through intellectual property. For an overview see Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2007).

Downloaded by [Yale University] at 12:00 04 September 2017

A2K movement, Amy Kapczynski argues that the A2K movement fundamentally reframed questions of intellectual property away from the focus on rights management to a broader normative debate on the nature of the knowledge economy and access to ideas, knowledge goods and services.[8] But even while tracing the rise of the A2K movement, scholars have commented that the A2K community does not really constitute a mass movement, and Gaëlle Krikorian for instance maintains that A2K "does not rely on massive street demonstrations as a constitutive means to confront the power structures that it challenges".[9] The DU photocopy case rebuts this presumption and demonstrates how A2K activism in the global south straddles traditional sites of activism along with demands for legal and policy reform.

After the publishers initiated legal proceedings, students in Delhi and other parts of the country took to the streets, organizing protest meetings and engaging in acts of civil disobedience targeted at the publishers. They were joined in this by prominent academics[10] including Nobel laureate Amartya Sen urging the publishers not to proceed with the case. Subsequently Oxford University students and academics followed suit with protest letters to the publishers. One of the most interesting protest events titled "Who is Afraid of Copyright Infringement" took place in the Delhi School of Economics with academics and writers signing photocopied versions of their books and gifting it to the library.[11] Last but not least one should also mention several creative responses including a copyright Christmas jingle penned by copyright lawyers.[12] In this note I will analyse both the decisions collectively, along the following thematic lines of enquiry: an overview of the factual background and interests implicated (Section 2); the difference between a market-centric and distributive justice-focused approach to the relevant educational use exception in Section 52(1)(i) (Section 3); the manner in which fairness is incorporated into the analysis (Section 4); narrow and broad understandings of "in the course of instruction" (Section 5); and the meaning of access (Section 6).

2. Factual background

The case began as a copyright infringement petition initiated in August 2012 by the three publishers indicated above against Rameshwari Photocopy Services, a photocopy shop located in the premises of DU, as well as DU.[13] They filed suit for a permanent injunction restraining Rameshwari Photocopy Services and – via the Delhi School of Economics, which was the university department directly implicated – DU from infringing copyright owned by them in various publications which had been photocopied and distributed to students in course packs.

[8]A Kapczynski, 'Access to Knowledge: A Conceptual Genealogy' in G Krikorian & A Kapczynski (eds), *Access to Knowledge in the Age of Intellectual Property* (Zone Books 2010) 17; see also A Kapczynski, 'Access to Knowledge Mobilization and the New Politics of Intellectual Property' (2008) 117 Yale LJ 804.

[9]G Krikorian, 'Access to Knowledge as a Field of Activism' in Krikorian & Kapczynski (eds), *Access to Knowledge* (Zone Books 2010) 57.

[10]See the petition, *Appeal to Publishers to Withdraw Suit filed against Delhi University*, <'https://www.change.org/p/academics-appeal-to-publishers-to-withdraw-suit-filed-against-delhi-university> accessed 30 June 2017.

[11]<https://spicyip.com/2012/10/du-photocopy-case-whos-afraid-of.html> accessed 30 June 2017.

[12]See <https://kafila.online/2012/12/27/merry-copyright-to-you-a-jingle-for-the-oxford-v-rameshwari-case/> accessed 30 June 2017.

[13]For more details on the background of the case see Radhika Oberoi, DU Photocopy Case: What happened and why it is important, <https://thewire.in/75786/du-photocopy-case/> accessed 17 July 2017.

Downloaded by [Yale University] at 12:00 04 September 2017

The course packs reproduced selected portions of copyright-protected materials ranging from 6 to 65 pages (or between 5% and 33.25%) of the original books. DU facilitated the photocopying of course packs in various ways – it licensed the premises for the shop to Rameshwari, provided access to the books contained in its library for making master copies (the basis for subsequent copies in the packs), the DSE syllabus formed the basis for the packs and DSE faculty members encouraged students to purchase the packs. The packs were sold at 40 paise per page (under half a rupee) which was determined to be more than at-cost but these were the same rates that any commercial photocopying shop would charge to photocopy any materials. In return, DU benefitted from free photocopies each month (up to 3000 pages). It is important to note that the DU syllabus never required entire books to be reproduced; only selected portions of protected books and journals were contained in the course packs.

Over the course of this litigation, the publishers expressed a number of concerns, which ultimately centred upon two inter-related arguments. They asserted that DU was effectively authorizing and supporting the photocopying of course packs, which would detrimentally affect the market for their books. Course packs were thus framed as competing products. Furthermore, if unauthorized and unremunerated copies were found to be permissible, the prospects of Indian universities entering into large-scale institution-wide licensing agreements with academic publishers would dwindle, if not disappear altogether.[14]

3. The educational exceptions and the public interest: from markets to distributive justice

The Copyright Act grants a suite of exclusive rights to copyright owners under Section 14 in relation to protected works, which includes the right to reproduce works, issue copies of works to the public, perform works and make adaptations or translations. Copyright is infringed under Section 51 when a third party engages in any of these restricted acts without the permission of the copyright owner. Infringement is established not just where the entire work is used without authorization but also where a substantial part – such as a photocopied excerpt from a book – is used.

The first major issue considered by the court goes to the structural design of copyright law and in particular, the relationship between copyright as a system of incentives guaranteed by the grant of exclusive rights to authors balanced against the need to ensure unimpeded A2K. One of the ways that copyright seeks to maintain this balance is by ensuring that even as it grants exclusive rights, it also carves out specific exceptions and limitations (E&Ls).[15] It has been widely acknowledged that the grant of rights to copyright holders without the safety net of corresponding restrictions does not merely adversely impact public access and impede development priorities but has

[14]See <https://www.cla.co.uk/higher-education-licence> accessed 30 June 2017 (For an example from the UK higher education context, where the licence provides annual blanket permission to copy restricted amounts from print and digital publications of those copyright owners represented by the Copyright Licensing Agency).

[15]For a discussion on the role of E&Ls see PB Hugenholtz and RL Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report* (The Open Society Institute 2008) <https://www.ivir.nl/publicaties/download/limitations_exceptions_copyright.pdf> accessed 30 June 2017.

Downloaded by [Yale University] at 12:00 04 September 2017

additional long-term implications for free expression, creativity and innovation.[16] There are various normative justifications provided for carving out E&Ls within copyright.[17] There are also different approaches to designing E&Ls, with (a) a "fixed categories" approach where defined categories of permissible uses such as educational uses, news reporting or parodies are identified in advance in the statute, being contrasted with (b) a flexible approach, where an open-ended multi-factor statutory test can accommodate new uses often made possible by emergent technology that was not anticipated by the legislature.[18] Jurisdictions such as the United Kingdom and India have conventionally preferred the former,[19] while the United States is associated with the latter, with its commitment to a "fair use" test.[20] Fairness is assessed under this flexible test by adducing evidence under four factors: (i) the purpose and character of the use, including whether it is commercial in nature; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used; and (iv) the effect of the use upon the potential market for or value of the copyrighted work.

Wendy Gordon in her study on the breathing space created by the American doctrine of fair use as a response to market failure argues that by their very nature, intangible goods are characterized by the "public goods" problem (inexhaustible once produced and prone to the free rider problem, thereby creating an incentive problem) and intellectual property is designed in part to respond to this problem.[21] However, the grant of exclusive rights also has the potential of creating market failures where producers of knowledge (through pricing and other mechanisms) may create artificial conditions of scarcity of knowledge resources even when it is socially desirable that the knowledge good be as widely available. In this account, L&Es, such as the doctrine of fair use, exist to prevent unreasonable restrictions on access.

As noted above, fair use is however only one of the various legal forms that may be deployed, and others include categories of work being excluded from copyright protection, permissible use for certain specific categories or cases such as education or news reportage and statutory or compulsory licenses.[22] Each of these "safety valves" is grounded within its own normative logic. The scope of the conduct permitted often corresponds to the underlying balance that is sought be maintained for that safety valve. For instance, the right to excerpt pre-existing works (or a quotation right) is premised on the idea that the ability to cite portions of pre-existing works is necessary for scholarship and does not threaten the market for the original work.[23] Within this

Downloaded by [Yale University] at 12:00 04 September 2017

[16]See S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (SCCR/9/7) 5 April 2003. For an overview of copyright issues in the global south see, A Story et al (eds), *The Copy/South Dossier* (Copy/South Research Group 2006) <https://kar.kent.ac.uk/6/1/CSdossier.pdf> accessed 30 June 2017.

[17]For an overview, see R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (CUP 2005) 15–41.

[18]Report of the Committee to Consider the Law on Copyright and Designs, Cmnd 6732 (*Whitford Committee Report*) (1977) [676]-[677] (Recommending the need for greater flexibility within UK copyright L&Es); Australian Productivity Commission Inquiry Final Report, Intellectual Property Arrangements (No. 78; 23 September 2016) 165–197 (Advocating a transition from a defined categories approach to a flexible US-style fair use); J Hughes, 'Fair Use and its Politics – At Home and Abroad' in R Okediji (ed), *Copyright in an Age of Exceptions and Limitations* (CUP 2017) 234.

[19]See respectively, C May et al, *Laddie, Prescott & Vitoria: The Modern Law of Copyright and Designs*, 4th ed (LexisNexis 2011) Ch 21 and DS Gangjee, 'India' in L Bently (ed), *International Copyright Law and Practice* (Matthew Bender 2016).

[20]17 US Code § 107.

[21]Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors, 82 Colum. L. Rev. 1600.

[22]R Hilty & S Nerisson, *Balancing Copyright – A Survey of National Approaches* (Springer 2012).

[23]See P Leval 'Towards a Fair Use Standard' (1990) 103 Harvard L Rev 1105.

categorical approach, educational exceptions[24] constitute a special class altogether as they allow for a potentially much wider zone of permitted uses. The conflict between the petitioners and respondents in the DU photocopy case rested on the differing interpretations about what was permissible.[25] This difference in interpretation has to be understood in light of the transformation of the academic market in recent decades, especially in the global north where a combination of aggressive law suits accompanied by favourable courts decisions has resulted in publishers being able to develop a market for photocopy licensing.[26] In this dispute the key provision which was under contestation was Section 52(1)(i)(i) of the Copyright Act. Section 52(1) lists out a series of acts which "shall not constitute an infringement of copyright", and clause (i) allows for the "reproduction of any work… by a teacher or a pupil in the course of instruction".

The petitioners claimed that DU had "institutionalised infringement by prescribing chapters from the publications of the plaintiffs as part of its curriculum/syllabus and permitting photocopy of the said chapters and sale thereof as course packs".[27] They grounded their argument on the claim that the reproduction was done commercially, that it affected the market of the publishers, that it was not covered under the exception granted in Section 52(1)(i) since the reproduction of works or parts thereof were not by students and teachers but by an intermediary, and further that it was not in the course of instruction. They sought from the court a narrow interpretation of the phrase "in the course of instruction" and to buttress this argument the petitioners contrasted the original wording of the section ("in the course of preparation for instruction") with its final avatar. The effect of their interpretation would have been to circumscribe instruction in a temporal and spatial manner such that instruction could only mean the actual delivery of a lecture in a classroom, over the course of which teachers could give hand-outs to students. Finally the petitioners sought to locate the statutory educational use exception within the doctrine of fair use, claiming that the four-factor test developed by the United States should be adopted into the Indian context as well.

The single judge bench rejected the publishers' contention. Justice Endlaw began by outlining the foundations of exclusive rights under copyright law, holding that even though they have some basis in natural rights claims, copyright today was entirely a creature of statute and it was therefore the statute that governed the scope of rights granted. Natural rights foundations could not be presumed to be predominant.[28] Even natural rights justifications for systems of property rights have their limits since any such claims run up against the argument that other people have (natural) rights as well.[29] Nevertheless, the importance of these observations lies in their ability to counteract a strand of copyright discourse that has informally "naturalized" itself. This strand of

Downloaded by [Yale University] at 12:00 04 September 2017

[24]G Hinze, Making Knowledge Accessible Across Borders: the Case for Mandatory Minimum International Copyright Exceptions and Limitations for Education, Capacity Building and Development (EFF, October 2008), available at https://www.eff.org/wp/making-knowledge-accessible-across-borders-case-ma See also WW Fisher and W McGeveran, The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age: A Foundational White Paper (2006). <http://cyber.law.harvard.edu/home/> accessed 30 June 2017.

[25]See M Chon, 'Intellectual Property 'from Below': Copyright and Capability for Education' (2007) 40 UC Davis L Rev 803.

[26]C McSherry, *Who Owns Academic Work? Battling for Control of Intellectual Property* (Harvard University Press 2001). On the propensity for risk aversion which leads to licensing as the safest option, see J Gibson, 'Risk Aversion and Rights Accretion in Intellectual Property Law' (2007) Yale LJ 882.

[27]*Delhi HC* at [14].

[28]*Delhi HC* at [26]-[27].

[29]H Breakey, 'Natural Intellectual Property Rights and the Public Domain' [2010] 73 Modern Law Review 208.

copyright consciousness frames it as a system of property rights management resting on natural rights foundations with insufficient attention paid to its potential as welfare legislation.[30] The defendants on the other hand foregrounded this aspect, arguing that copyright has to be seen as a welfare law especially in a country like India, where access to learning materials is one of the most serious impediments to education. Informal infrastructures constitute a significant part of a complex ecosystem of knowledge transmission. The very existence of defined permissible uses was for the defendants an indication of normative considerations other than profit that informed copyright law and policy.[31]

Justice Endlaw's decision relies upon the structural logic underlying the Copyright Act. Section 14 clearly provides exclusive rights to owners of copyright for literary works, which include the right to prohibit reproduction through the form of photocopying. However, if the act of photocopying by teachers and students is exempted or excluded, then there is no question of infringement at all.[32] The scope of the exclusive rights protected via infringement does not extend to cover such educational uses in the first place. He makes two important moves in order to reach this conclusion. First, he reiterates that since copyright exclusivity does not rest on natural rights foundations,[33] its contours are to be found in the statute, whose provisions must be interpreted in relation to one another. Within this relational legislative framework, Section 52 identifies certain acts which are "not to be an infringement of copyright". They are legislatively defined to be outside the scope of infringement. At this point, he makes the second move. Since these permitted acts are non-infringing in the first place – as opposed to being infringing but nevertheless justifiably excused by way of a defence – there is no need to adopt a method of statutory interpretation which reads defence-like provisions restrictively. Consequently,

> the rights of persons mentioned in [s]ection 52 are to be interpreted following the same rules as the rights of a copyright owner and are not to be read narrowly or strictly or so as not to reduce the ambit of [s]ection 52, as is the rule of interpretation of statutes in relation to provisos or exceptions.[34]

The division bench affirmed this interpretation while providing an imaginative musical analogy to explain how a statute may provide exclusive rights to commercially exploit a work even as it allowed for the exploitation of the work without compensation. Comparing a statute to a musical work, the court rhetorically asked whether it was "possible that a provision in a statute partially drowns another provision"?[35] Answering this affirmatively, the court suggested that it was desirable that in the melody of a statute all notes should be heard. Sometimes the loudness of one particular provision silences all other provisions, while on other occasions, in order to hear the melody of a statute a section may need to be muted.[36] Underlying their musical analogy, one can discern the division bench articulating a polyphonous theory of copyright that is

[30]Cf R Okediji, 'Copyright and Public Welfare in Global Perspective' [1999] 7 Indiana J. Global Legal Studies 117.
[31]For a discussion of a human rights approach to intellectual property which recognizes non-market values, see P Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2007) 40 UC Davis L Rev 1039; LR Helfer & GW Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (CUP 2011).
[32]*Delhi HC* at [29].
[33]*Delhi HC* at [25]-[31]. In precise, while common law copyright may have rested on natural rights foundations, copyright legislation superseded common law copyright.
[34]*Delhi HC* at [41].
[35]*Delhi DB* at [76].
[36]*Delhi DB* at [77].

Downloaded by [Yale University] at 12:00 04 September 2017

premised on an acknowledgment of the diverse interests embedded within copyright statutes, not least of which are public interest considerations.[37]

In the arguments before the single judge bench the petitioners had specifically anticipated a public interest argument and sought to nullify it, arguing that no such arguments could be recognized outside the scope of Section 52 and that no other relief in the public interest could be claimed.[38] In their rejoinder they added without irony that public interest arguments could not be myopic and should be interpreted keeping in mind the incentives for writers and publishers to produce works.[39] What the petitioners were effectively arguing for was a free market conception of the public interest in which the market and commercial interests of publishers would be the sole determinative factor.[40] DU countered this argument by acknowledging that although the dispute arose in a copyright context, it had to be judged in light of constitutional principles. The right to education was found in both the fundamental rights chapter of the Constitution and the directive principles of state policy, while the right to access knowledge was a key component of the right to education. [41]

Both courts rejected any presumption of a market-based conception of the public interest and instead chose to situate public interest within the educational challenges of a country where access to quality leaning materials varies depending upon class, caste and other social barriers. This best evidenced in the division bench's observations:

> It is thus necessary, by whatever nomenclature we may call them, that development of knowledge modules, having the right content, to take care of the needs of the learner is encouraged. We may loosely call them textbooks. We may loosely call them guide books. We may loosely call them reference books. We may loosely call them course packs. So fundamental is education to a society – it warrants the promotion of equitable access to knowledge to all segments of the society, irrespective of their caste, creed and financial position. Of course, the more indigent the learner, the greater the responsibility to ensure equitable access.[42]

While copyright law is usually thought of in terms of content (i.e. the outputs), creativity and incentives for production, the actual process of knowledge production and dissemination is enmeshed in complex networks of infrastructure and circulation. Within copyright one can see doctrinal divergences emerging from a focus on content versus a focus on infrastructure and political economy. The landmark fair use case of the US Supreme Court in *Campbell* v. *Acuff Rose*,[43] which found the making of parodies to be within fair use, is an example of a content-driven understanding of copyright. In contrast the 1992 decision of

[37]For an interesting perspective on aesthetic metaphors in the law see D Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (University of California Press 2000).
[38]*Delhi HC* at [14].
[39]*Delhi HC* at [20].
[40]Shubha Ghosh argues that relying on wealth or welfare maximization alone is inadequate and we need to consider normative criteria, such as distributive justice to fully determine the governance structure for the intellectual property commons. Distributive justice in this view enables social arrangements "that aid and distribute resources to those who are excluded from democratic and market arrangements". S Ghosh, 'The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets' (2007) 40 UC Davis L Rev 855, 859.
[41]In *Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi & Ors*.,1981 SCC (1) 608 the Court laid down the foundation for the fundamental right to education, with its interpretation of the right to life, embedded in Article 21 of the Indian Constitution and specifically referenced the right to read. "The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms…" (Paras 6 & 7).
[42]*Delhi DB* at [30].
[43]510 US 569 (1994).

Downloaded by [Yale University] at 12:00 04 September 2017

the court of the US 9th circuit in *Sega* v. *Accolade*,[44] which recognized reverse engineering of computer programs to be within fair use, could be seen as example of copyright doctrine that is located within an understanding of the critical role of competition and infrastructure in the knowledge economy.[45] Thus even as we think of universities and publishers as critical components of an ecology of knowledge we cannot lose sight of the fact that in countries like India the photocopying machine has always been one of the unsung heroes of knowledge dissemination.[46] Following Roland Barthes prescription that we need to move away from a writerly conception of a text to a readerly conception if we are to truly understand the process of meaning making,[47] one could argue that a readerly conception of the photocopy machine furnishes an image of it not as a weapon of mass destruction of knowledge but rather as a facilitator. This attention to infrastructures of learning was not lost on the court and in his decision, Justice Endlaw observed:

> It cannot be lost sight of that we are a country with a bulging population and where the pressure on all public resources and facilities is far beyond that in any other country or jurisdiction. While it may be possible for a student in a class of say 10 or 20 students to have the book issued from the library for a month and to laboriously take notes therefrom, the same is unworkable where the number of students run into hundreds if not thousands.[48]

Similarly, the division bench, when addressing the question of an adverse impact on the underlying market for books, cites the example of literacy programmes to conclude that the reproduction of an entire work as a part of a literacy programme cannot be said to affect the underlying market of books since the recipient is not a potential customer. They find this comparable to the case of students who require reference books. Rather than accepting the averment of the petitioners that mass scale photocopying threatens to destroy the market for academic books, the court instead concludes that it "could well be argued that by producing more citizens with greater literacy skills and earning potential, in the long run, improved education expands the market for copyrighted materials".[49]

The rhetoric of the destruction of the market for books and the absence of incentive to authors is by now a well-worn trope used by the copyright industry. Rejecting the dire image of a creative wasteland that will be unleashed by an expansive reading of Section 52, the Delhi High Court offers us an image of potential, in which a contextualized understanding of copyright exceptions could create a future market for books. In what is arguably the clearest philosophical vision of copyright articulated by an Indian court, Justice Endlaw emphatically states:

> Copyright, [e]specially in literary works, is thus not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to increase and not to impede the harvest of knowledge. It is intended to motivate the creative activity of authors and inventors in order to benefit the public.[50]

Downloaded by [Yale University] at 12:00 04 September 2017

[44]977F 2d 1510 (9th Cir 1992).
[45]For an extended treatment, see B Frischmann, *Infrastructure: The Social Value of Shared Resources* (OUP 2012) 253–314.
[46]For an account of a history of the photocopier as radical technology see K Eichhorn, *Adjusted Margin: Xerography, Art, and Activism in the Late Twentieth Century* (MIT Press 2016).
[47]Roland Barthes, Roland. *The Pleasure of the Text* (Hill and Wang 1975).
[48]*Delhi HC* at [89].
[49]*Delhi DB* at [36].
[50]*Delhi HC* at [80].

It is not entirely surprising that many of the authors on whose behalf the publishers had filed their infringement suit turned against the publishers. In the immediate aftermath of Justice Endlaw's judgment, Satish Deshpande, a professor of sociology at DU welcomed the decision in an opinion piece.[51] Providing an educator's perspective on the case, he concluded that "quality higher education is not compatible with an overzealous copyright law".[52] Deshpande lays bare the hypocrisy of a system in which academics (whose salaries are sustained by public money) and who offer free intellectual labour by way of peer reviews "gladly give away their manuscripts for lifetime royalties that are usually less than a single month's salary". "Buying the readings", Deshpande adds, "for even a single course at market prices easily adds up to tens of thousands of rupees, turning a masters' degree into an unaffordable multi-lakh luxury".[53]

4. Applicability of fair use

The second major issue that the courts had to consider was whether an additional requirement of fairness should be read in to Section 52(1)(i) and if so, what form that fairness requirement should take. At this point it is worth once again emphasizing that fair use and fair dealing are not synonymous.[54] The former conventionally refers to a general multi-factor approach to L&Es in the United States (an open-ended L&E test under which identifiable and policy-driven patterns of permitted uses can emerge over time),[55] while the latter is an *additional requirement* which is attached to defined categories of permitted uses. Therefore in the UK Copyright Designs and Patents Act 1988, there is specific reference to fair dealing as an additional requirement only in Sections 29 (research and private study) and 30 (criticism, review, quotation and news reporting). There are several other L&Es which make no reference to fair dealing in this legislation. Indian legislation adopts a similar structure, with "fair dealing" being specifically required only in Sections 39 (acts not infringing broadcast reproduction right or performer's right) and 52(1)(a) (private or personal use, including research; criticism or review; reporting of current events). As a matter of legislative design, India has never had "fair use" because it has never adopted a US-style flexible test potentially capable of accommodating all E&Ls. Using the two terms interchangeably leads to inaccurate analogies and confusion. However, both fair use and fair dealing draw on a similar pool of factors (how much of the original work did the defendant take, for what purpose, etc.) when assessing fairness.[56]

Since Section 52(1)(i)(i) permits the unauthorized reproduction of protected works "by a teacher or pupil in the course of instruction", with no reference to "fair dealing", the publishers argued that (a) fairness-derived limits nevertheless ought to be read in to this provision and (b) the content of those fairness limits should be borrowed from the US fair use test.[57] This would have had the effect of serving as a limiting principle, and

[51]Satish Deshpande, 'Copy-Wrongs and the Invisible Subsidy', The Indian Express 7 October 2016.
[52]Ibid.
[53]Ibid.
[54]See Section 3.
[55]P Samuelson, 'Unbundling Fair Uses' (2009) 77 Fordham L Rev 2537; M Sag, 'Predicting Fair Use' (2012) 73 Ohio State L J 47.
[56]I am grateful to Dev Gangjee for this point.
[57]*Delhi HC* at [14]; *Delhi DB* at [27]. The plaintiffs were supported by a precedent which suggested that "fair use" or "fair dealing" should be read in as a general threshold requirement for all the provisions of s 52(1). See *Syndicate of the Press of the University of Cambridge* v. *BD Bhandari & Ors* 2011 (47) PTC 244 (Del DB).

Downloaded by [Yale University] at 12:00 04 September 2017

it is understandable why the petitioner found it attractive. The third and fourth factors of the US test refer respectively to the quantum of material taken and the impact of the defendant's use on the potential market of the work.

Both courts resisted this attempt at selective legal transplantation. Justice Endlaw drew a clear distinction between the general principles of fair dealing, which were applicable to personal use and research under Section 52(1)(a) and other uses envisaged in the rest of the section. Distinguishing between an omnibus or general clause and a special provision, he concluded that Section 52(1)(i) dealt specifically with the needs of education and could not be expanded or restricted by applying the general principles of fair dealing and broadly applicable tests developed for its interpretation.[58]

The division bench went on to address this question in greater detail. It was willing to accept that there "has to be fairness in every action… irrespective of a statute expressly incorporating fair use, unless the legislative intent expressly excludes fair use".[59] While some degree of fairness should serve as a barometer for all permissible acts, it was clear that the legislature had not incorporated a specific conception of fair dealing or fair use as a limiting principle when allowing for reproduction by teachers and students. "Therefore, the general principle of fair use [i.e. fairness] would be required to be read into the clause and not the four principles on which fair use is determined in jurisdictions abroad".[60] As for the content of fairness in this context, the unauthorized use would be permissible to the extent justified by the purpose of the use. It

> would have no concern with the extent of the material used, both qualitative or quantitative… so much of the copyrighted work can be fairly used which is necessary to effectuate the purpose of the use i.e. make the learner understand what is intended to be understood.[61]

This approach of the court stands in sharp contrast to the market-oriented understanding of fairness espoused by the petitioners and can instead be located more convincingly within a norm of distributive justice.[62]

This is also a significant departure from the approach that scholars like Wendy Gordon have taken to the question of fair use, which is applicable only in the event of extreme market failure. The conscious linkages made between education and the promotion of equitable A2K is evidence that the court was developing its notion of fairness beyond the confines of the four-factor test.[63] Even though not explicitly stated in either of the decisions, the implications of this anchoring of copyright doctrine within a philosophy of A2K have far-reaching consequences for a reframing of the normative values underlying copyright. If the focus of copyright has been on respecting property rights, the alternatives to intellectual property (IP) which have emerged as global movements (including movements such as free software, open content, open access) have relied upon two primary social imaginaries, that of freedom and of access. While the former

Downloaded by [Yale University] at 12:00 04 September 2017

[58]*Delhi HC* at [43].
[59]*Delhi DB* at [31].
[60]Ibid.
[61]Ibid at [33].
[62]For a useful overview of the distributive justice approach to intellectual property see K Aoki, Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development), (2007) 40 UC Davis L Rev 717; MS van Houweling, 'Distributive Values in Copyright' (2005) 83 Texas L Rev 1535, 1540.
[63]*Delhi DB* at [30].

focuses on the threats of punitive copyright regimes on creative expressions, they have tended to resonate with the concerns of the global north. In this imaginary, the figure of the remixer emerges as a heroic figure of resistance. At the same time the A2K movement, beginning with access to medicine and spreading to knowledge and culture, has been similarly concerned with the effects of an expansionist IP regime but aligns itself less with freedom and more with equity. The demand for access is always a structural claim for distributive justice.[64]

The global significance of the two Delhi High Court decisions flows from the manner in which they provide us with a conceptual vocabulary for reconciling the two social imaginaries or traditions of liberty and equity. It is perhaps only befitting that Amartya Sen was one of the first public voices to come out in support of the right of students to access learning material.[65] Sen's conceptualization of development as freedom was premised on the idea that "unfreedom" is constituted by lack – whether of choice or of opportunities – and an integrated understanding of political freedom would necessarily have to embrace principles of distributive justice.[66] Appositely, Sen's argument of "social opportunities" being one of the key determinants not only for the conduct of private lives but for political participation was illustrated by the right to read and communicate. Education is understandably high on the list of Sen's criteria for establishing the link between development and freedom, and it to this aspect of the judgment that we now turn.

Downloaded by [Yale University] at 12:00 04 September 2017

5. Narrowing and expanding instruction

The second major conflict between a narrow and an expansive interpretation arose out of the dispute over what constitutes "instruction" in Section 52(1)(i)(i) of the Copyright Act. The petitioners sought to restrict "instruction" to a classroom context in which there was a direct face-to-face interaction between the teacher and the student. They argued that reproduction could only be allowed in such a situation and does not cover the prescription and preparation of course packs.[67] At the core of the dispute was the question of when instruction begins and ends. While the petitioners sought a spatial understanding of instruction, the defendants argued for a temporal understanding of instruction which begins much before the classroom interaction and continues after it as well. The effect of adopting the petitioner's argument would have been a completely reductionist and instrumental understanding of education, with serious consequences not just for the question of copyright and access to learning materials but one that would have established a jurisprudence of education completely at odds with the actual manner in which teaching takes place. Justice Endlaw and the division bench rejected this argument and favoured an interpretation of instruction which was more processual. Justice Endlaw focused on the term "in the course of" and followed the Supreme Court's decision in *Md. Serajuddin* v. *The State of Orissa*.[68] He held that the term implied not only a period of time during which a movement is in progress but rather it postulates a "connected relation". In addition to the idea of a connected

[64]M Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (Yale University Press 2012).
[65]A Mohanty 'Authors, Academics and Students Protest Publishers' Move in Delhi University Copyright Case' (19 September 2012) <https://spicyip.com/2012/09/authors-academics-and-students-protest.html> accessed 30 June 2017).
[66]A Sen, *Development as Freedom* (OUP 1999).
[67]*Delhi HC* at [58].
[68](1975) 2 SCC 47.

relation, Endlaw also drew on important legal tests that have determined what constitutes "in the course of" including phrases such as "integral part of continuous flow", "causal relationship" and "continuous progress from one point to the next in time".[69] Applying these tests to the question of instruction concluded that a proper understanding of instruction would incorporate the entire academic session for which the pupil is under the tutelage of the teacher, including the preparation of syllabus and reading materials.[70]

It is alarming that the petitioners who comprise some of the most distinguished academic publishers in the world, with a long history of contributing to pedagogy and the pursuit of knowledge, would advance such a constricted understanding of educational instruction. This was noted by the division bench, who effectively characterized the petitioner's conception of education as a "boring method" of teaching consisting of unidirectional lectures while the use of readings materials facilitated an "interactive method" more akin to a group discussion anchored in the prescribed readings.[71] The division bench also selectively developed parallels with the New Zealand decision of *Longman Group*, where both the additional fairness or fair dealing threshold requirement and "in the course of instruction" had been considered.[72]

6. Rejection of US legal standards

The internationalization of copyright standards, beginning with the Berne Convention for the Protection of Literary and Artistic Works, 1886 and reinforced by the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994, has resulted in the establishment of common minimum standards that countries are required to follow in their national IP legislations. The plaintiffs referenced "international" copyright law in two ways – first by suggesting that any reading of a domestic copyright exception would have to respect restrictions on the scope of L&Es contained in these two multilateral treaties and second by drawing on comparative law resources to suggest there were persuasive arguments to be found in other common law jurisdictions which favoured a restrictive reading of an educational use L&E provisions.

If the former is the formal plane of internationalization, IP doctrine is often accompanied by informal internationalization through judicial borrowings. If copyright law is a system of intricate balances, the judicial interpretation of copyright disputes plays a crucial role in adjudicating between competing claims and the ideological inclination of courts manifest in the ways that they either emphasize the private interest aspect or the public interest dimension of copyright. If the United States has generally been a copyright maximalist country in terms of its policies, the US courts have also similarly displayed (with a few exceptions) a protectionist tendency.[73] Thus whenever faced with the question of the legal status of photocopying, the courts have tended to presume the prima facie legitimacy of the claim of copyright owners and then go into questions of what the

[69] *Delhi HC* at [61]-[72].
[70] *Delhi HC* at [72].
[71] *Delhi DB* at [39].
[72] *Longman Group Ltd* v. *Carrington Technical Institute* (1991) 2 NZLR 574.
[73] See for e.g. *Eldred* v. *Ashcroft*, 537 US 186 (2003) (Upholding the Copyright Extension term Act); L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin Press 2004); S Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York University Press 2001).

Downloaded by [Yale University] at 12:00 04 September 2017

exceptions may allow. The petitioners tried to persuade the court to adopt the US approach in the Indian context, arguing for the adoption of the four-factor framework for fair use as well as relying on specific cases that have addressed the question of photocopied course packs. In particular, they relied on *Basic Books Inc* v. *Kinko's Graphics Corporation*[74] and *Princeton University Press* v. *Michigan Document Services Inc*,[75] both of which held that preparation and selling of course packs to college students amounted to infringement. The respondents directed the attention of the court to the dissenting opinion in *Princeton University Press*, which held that the identity of the person operating the photocopy machine is irrelevant as long as the purpose was the making of copies for the student.

The single judge and the division bench were united in their rejection of any attempt to uncritically adopt comparative law influences, including US standards, into Indian law. While Justice Endlaw focused on the question of legislative freedom, the division bench addressed the issue of doctrinal borrowing.[76] Endlaw's opinion accords primacy to the legislative freedom exercised under international treaties, arguing that if the Indian parliament allowed for the reproduction of works without any qualitative or quantitative restrictions because it was justified for the purpose of teaching and not unreasonably prejudicial to the legitimate interest of the author, then it was not for courts to impose any limitations on the same. The division bench similarly reiterated that both Article 13 of the TRIPS Agreement and Article 9 of the Berne Convention provided enough flexibility to countries to incorporate appropriate provisions in copyright statutes for the dissemination of knowledge. As evidence, the court referenced the legislative intent indicated in the parliamentary debate on amendments to the Copyright Act in which the minister had explicitly stated: "Many of these copyrighted materials can be used, should be used and must be used in non-profit libraries".[77]

Amongst the arguments pursed by the petitioner, one of the most trivial was the claim that the act of reproduction was not protected under Section 52(1)(i)(i) because it was being carried out through an intermediary and not directly by the teacher or the student.[78] But given the nature of litigation, trivial claims can become an opportunity for courts to reflect on and to produce apposite results. While the petitioners had sought to distinguish the exception provided in Section 52(1)(d) permitting the use of copyrighted materials for the purposes of judicial proceedings, Justice Endlaw used precisely this judicial use of photocopies as an analogy to articulate the role of libraries and photocopiers as knowledge disseminators rather than commercial intermediaries. Comparing the role of photocopy services in courts and in medical colleges, Endlaw concluded that medical science would suffer were such photocopying prevented.[79] Extending his reflection on the role of the traditional library, Justice Endlaw then slipped in a radical observation, the legal effects of which it will be interesting to track in future cases. He observed that with technological advancements, students can use their mobile phone cameras to photograph pages from a book and this would qualify as fair use as well.[80] This is consistent with his stance on technology and access throughout the

[74] 758F Supp 1522.
[75] 99F 3d 1381 (6th Cir 1996).
[76] *Delhi HC* at [99]-[100]; *Delhi DB* at [19]-[20], [64]-[68].
[77] *Delhi DB* at [28].
[78] *Delhi DB* at [60].
[79] *Delhi HC* at [77].
[80] *Delhi HC* at [78].

Downloaded by [Yale University] at 12:00 04 September 2017

judgment. He reasons that if an act (such as the physical copying of a book as was the case when he was a law student) is not an offence in itself, then the simplification of the act through technological advancements should also not be considered an offence.

7. Conclusion: what can we talk about when we talk about access

It is evident that I consider the two Delhi High Court decisions a very significant step forward in developing a jurisprudence of A2K but as with all legal cases there is as much to be gleaned from what is *not* stated. By its very nature legal argumentation requires for it to be presented in a particular form and the favoured mode remains interpretative disputes over the scope and meaning of certain words and phrases. There are of course entire worlds at stake in the precise meaning accorded to words, as evidenced by the juridical significance of phrases such as "in the course of instruction" or "course packs" in the DU photocopy case. Yet social worlds and practices do not always neatly fit into the pigeonholes of legal concepts or language. One of the key conceptual challenges arising out of these two decisions is the manner in which the politics of knowledge or the political economy of access may become cognizable questions for courts.

If A2K was one of the keenly contested concepts before the court, access was determined primarily on two parameters – cost and availability – both of which appropriately informed the decisions of the court. While the petitioners claimed that the photocopier and the University had effectively reproduced substantive portions of the copyrighted works, the defendants – especially through the submissions and arguments made by ASEAK – demonstrated that the quantum of reproduction was relatively low. In addition, using an example of the prescribed syllabus of a single course in the MA sociology course at DU, the defendants demonstrated that there were over 20 prescribed books for the course, which would cost more than Rs. 80,000 per student if they were expected to buy them. This was a particularly compelling argument and served as a very graphic illustration of the serious impediments posed by the question of cost and availability of learning materials. Yet at the same time, what was not stated before the court and possibly could not be was that at least 18 of the 20 books were available for free to download on various informal or pirate book sharing websites on the Internet.[81]

While there is a clear distinction between the defendants' arguments before the court relating to legally permissible forms of usage and the clearly illegal forms of access that are made available via various shadow libraries,[82] the dichotomy between the two domains (the normative public sphere of reading and literacy on the one hand and the real-world practices of knowledge sharing and dissemination) alerts us to an almost charmingly anachronistic manner in which legal claims are made in the knowledge economy. Underlying this dichotomy is a much more interesting conceptual paradox, which illustrates two different conceptions of access. I have elsewhere described the distance between the two as a form of paternal access on the one hand and defiant access on the other.[83] While the former relies on a language of piety which incarnates students as worthy subjects of developmental dispensation, the latter

[81]Based on research conducted by ASEAK over the course of the litigation.

[82]For background, see B Bodó, 'A Short History of the Russian Digital Shadow Libraries' (4 November 2014) <https://ssrn.com/abstract=2616631> accessed 30 June 2017.

[83]Lawrence Liang, 'Access beyond developmentalism, Information Technologies & International Development' [2010] 6 SE, Special Edition 65–67.

Downloaded by [Yale University] at 12:00 04 September 2017

navigates its ways into access the through everyday logic of creativity and innovation that pays little heed to constraints placed upon it – whether of law or of technology.

It is commonplace knowledge that access to scientific and academic journals in developing countries remains one of the key hindrances to an equal participation in the world of ideas, and yet there are a number of websites that allow students to access these otherwise unavailable intellectual resources which are safeguarded by licensing arrangements and technology locks. While this has not become the subject of any legal dispute in India thus far, they have come under the scrutiny of courts particularly in the United States and in Europe. One of the most infamous cases that resulted in the death of Aaron Swartz (arguably the first martyr of the A2K movement) arose out of a punitive copyright suit that had been initiated against Schwartz for attempting to download the entire database of JSTOR. Interestingly Schwartz had himself been motivated by enabling access to students in countries that cannot afford to be expensive subscription fees and in particular he had cited the example of India.[84] Two other recent examples of legal disputes over illegal book sharing websites are those of Aaaarg.org, an online community that scans and shares academic books,[85] and Sci Hub,[86] both of which are used extensively by students and academics in India.

It could be argued that informal sharing practices have always existed in parallel with the law and that questions of legal access are distinct from pirate practices because the former can be brought within the pale of legal language and legal claims while the latter will always exist beyond the domain of legality. In reality these two worlds are much more intimately intertwined and the latter is often the product of the limitations of the former. Consider, for instance, the following: In 2013, as part of an effort to popularize its academic journal databases in India, Sage Publishers offered a week of unlimited access to students at a leading university in a south Indian city. This was a promotional arrangement intended to encourage the university to subscribe to the service. This taste of access, however, led to an unexpected gulp. Anticipating that the university might reject Sage's subscription costs, a group of students, led by a PhD candidate in literature, downloaded all of the important Sage journals into an offline archive. They called themselves "Pradeep's eleven" – a reference to the heist film "Ocean's eleven". Within days, the university received a warning and free access was withdrawn. By then, however, the students had assembled a very large archive. This new archive, in turn, was combined with a still larger unofficial library assembled from material brought by students returning from universities abroad and other clandestine acts of copying. This combined library now circulates widely within the university on portable hard drives and flash drives. As students acquire new materials, the collection slowly grows and new versions become canonical and as new students enter the university, the collection is passed on.[87]

[84] N Sims, 'Library licensing and criminal law: The Aaron Swartz case' [2011] 72 College & Research Libraries News 534.
[85] https://conversations.e-flux.com/t/the-lawsuits-against-and-global-reach-of-aaaaarg-org/3141 See also Rochelle Pinto, Pirates in our public library: Why Indian scholars are closely watching a court case in Quebec, https://scroll.in/article/802182/pirates-in-our-public-library-why-indian-scholars-are-closely-watching-a-court-case-in-quebec.
[86] Sci Hub and Libgen make available academic and journal articles available to everyone including those without an expensive university subscription. Elsevier has sued Sci Hub and Libgen for $15 million for infringement of their copyright in academic journals. See Justin Peters, Why Is It So Expensive to Read Academic Research? <http://www.slate.com/articles/health_and_science/science/2016/04/the_lawsuit_against_sci_hub_begs_the_question_why_are_academic_journals.html>
[87] Personal interviews; on file with the author.

Downloaded by [Yale University] at 12:00 04 September 2017

Three months after the division bench's decision in the DU photocopy case, academics across India received a letter from Taylor & Francis asking them for information on the viability of a partial open access plan.[88] The plan would enable countries in the global south to access their database for a one-month period once a year, and amongst other things the letter stated they were interested in encouraging academics in the global south to "participate and contribute to debate in the worldwide academic community". It is difficult to say if there is a link between the decision and the timing of the letter but initiatives such as these, while seemingly a move away from an aggressive market oriented approach towards a more reconciliatory one, are nonetheless plagued by the problem of paternal access. It is also telling that one of the questions that Taylor & Francis asked the academics was whether they felt that such a move would eventually increase the readers of Routledge eBooks and eBook chapters demonstrating that eventually what seems to matter is the development of a viable market for electronic databases in the global south.

If the decisions in the DU photocopy case are an example of how the law can and indeed must respond to the real-world challenges of access to learning materials in developing countries, one is encouraged to speculate about their role as precedents in future disputes that are bound to arise over access to portions or full text versions of journal articles and electronic books. In his remarks on the South African constitution, Justice Pius Langla's invoked the metaphor of a bridge to designate the law, describing the South African constitution as "a historic bridge" between a past marked by injustice and suffering and a more hopeful future. In the case of A2K the future has already arrived in the form of the digital moment that promises to democratize access in a manner that was hitherto unimagined. Bodo Balazs, a Hungarian copyright scholar, argues that seen from within the internal logic of copyright law, LibGen is merely a pirate website that enables massive downloading of illegal books, but seen as a knowledge transfer project, it is arguably one of the greatest transfers of knowledge that we have seen since the invention of the Gutenberg press.[89]

This is particularly significant given the scandal of access in academic publishing, in which the market for online journals and databases are tightly controlled by a handful of global players enabling them a free rein to price their services so exorbitantly that even the richest universities complain of them being unaffordable while universities in the global south routinely suffer from problems of access. Citing the example of the Indian Institute of Science (IISC), Arunachalam and Muthu point out that in 2002 the IISC received only 1381 print journals, of which 200 were accessible online. After the creation of the government-led Indian National Digital Library in Engineering Sciences and Technology (Indest) in 2003, which enabled consortia-based access to electronic databases, this number increased to 9100 journals.[90] While this is clear progress and 9000 seems like a large number, in practice it represents a small fraction of the number typically received by US universities. Columbia University, for example, received 133,831 serials (journal titles and book series) in 2007, Johns Hopkins University received 105,453 serials and Pennsylvania State University received 88,668 serials. Even a smaller university like Delaware received 29,246 serials. Such discrepancies mark what

[88]Letter on file with the author.
[89]Presentation at CAMP (Critical Arts and Media Practice), Mumbai on 6 July 2016.
[90]S Arunachalam and M Muthu, Open Access to Scholarly Literature in India: A Status (Centre for Internet & Society 2011) <http://cis-india.org/openness/publications/open-access-scholarly-literature.pdf> accessed on 30 June 2017.

Downloaded by [Yale University] at 12:00 04 September 2017

Downloaded by [Yale University] at 12:00 04 September 2017

Padmanabhan Balaram, the Director of the Indian Institute of Science, has described as the problem of asymmetry in the world of publishing, which excludes poorer countries from participation in the circuits of global knowledge.[91] India, in this context, is far from the worst positioned. Citing an example from the World Health Organization, Arunchalam notes that in the 75 countries with a GNP per capita per year of less than $1000, fewer than half of medical institutions had any journal subscriptions. In countries with a GNP between $1000 and $3000, 34 per cent had no subscriptions; a further 34 per cent had an average of two subscriptions per year.

The emergence of such a wide disparity in A2K is itself the product of structural inequality aided by legal bottlenecks. Beginning in the 1940s, a number of formerly colonized countries identified education as critical to growth but realized that the failure of multinational publishers, mostly headquartered in the developed world, to engage in differential pricing represented a severe challenge. These newly independent countries attempted to reexamine and revise the prevailing treaty on international copyright law, the Berne Convention. India's position was that

> the high production costs of scientific and technical books standing in the way of their dissemination in developing countries could be substantially reduced if the advanced countries would *freely allow* their books to be reprinted and translated by underdeveloped countries.[92]

In 1967, the Stockholm Conference Protocol Regarding Developing Countries was adopted as part of an effort to revise Berne to reflect the needs of these new countries. This was the first time that the newly independent countries were able to come to the table and assert their interests in international copyright laws. The Protocol had an expanded understanding of education and included distance learning, adult education and literacy programmes, but despite its ground-breaking status, the Stockholm Protocol never became part of the Berne Convention due to developed countries' refusal to sign it.[93]

This is also the period that coincided with the cold war that was waged in India through a lethal combination of food politics[94] accompanied by textbook propaganda. Any scholar from the social sciences and humanities working on South Asia quickly realizes the absurdity of the situation when a large number of books on South Asia are not available in India but are available in universities in the United States. What's more, most of these books usually come stamped with a declaration "Donated by the Library of Congress under P.L. 480 program". The PL480 programme or the "food for peace" programme was primarily a cold war agenda pursued by the United States in Asia to counter Russian influence but one which had an ancillary but devastating impact on access to learning materials.[95] As a part of the repayment of the interest on a wheat loan that India had taken from the United States, the repayment was done through the procurement of South Asia books and materials for libraries in US universities since "area studies", the academic offspring of the cold war, saw a spike in demand for area-

[91]See <http://www.scidev.net/global/communication/feature/q-a-open-archives-the-alternative-to-open-access.html> accessed on 30 June 2017.

[92]CF Johnson, 'The Origins of the Stockholm Protocol' (1970) 18 Journal of the Copyright Society of the USA 91.

[93]For the background, see IA Olian Jr, 'International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris' (1973) 7 Cornell International LJ 81.

[94]Nick Cullather, *The Hungry World: America's Cold War Battle against Poverty in Asia* (Harvard University Press 2010).

[95]See A Rubin, *Archives of Authority: Empire, Culture, and the Cold War* (Princeton University Press 2012); E Haddadian-Moghaddam, 'The Cultural Cold War and the Circulation of World Literature: Insights from Franklin Book Programs in Tehran' (2016) 1 *Journal of World Literature* 371.

Downloaded by [Yale University] at 12:00 04 September 2017

specific materials. The second part of the PL480 programme arose out of the recognition that the best way to counter Russian influence – a small one part of which came in the form of cheap Russian books to India – was through the exporting of subsidized American textbooks to India. Between the 1950s and early 1960s, roughly 80 million copies of 9000 titles in 51 languages were distributed in the "Third World". In India alone approximately 8.5 million books were printed and thousands of titles distributed between 1951 and 1972. The idea of using books as a part of the ideological battle in the cold began post-World War 2, through the exporting of American books to Europe as a part of the Denazification of Germany. Interestingly the phrase that was used was the need to feed the "book hunger" of Europe.[96] Philip G. Altbach, then a Fulbright scholar in India, wrote a piercing article in 1971 identifying the threats posed by the PL480 books, using the phrase neocolonialism to describe the situation of academic publishing in India.[97] In particular he warned of the negative impact that imported books would have on the indigenous academic market and of the absence of contextual relevance. An Indian publisher, in an interview to Altbach, says:

> [The] PL 480 programme delivers a crippling blow to the Indian publisher who refuses to be tempted by the blandishments of foreign governments and publishers to become a mere reprint house for their books and who insists on performing a more exalted task – that of presenting and promoting the finest in Indian thought and scholarship. He has to compete on grossly unequal terms with the foreign publisher whose vast resources are more than amply augmented by generous subsidies from his own government.[98]

This is merely a snapshot of the complex cultural politics that underlies global knowledge regimes and I offer it primarily as a conceptual gambit, to support a more sustained engagement with what a jurisprudence of access may entail.

How may judicial decisions about copyright respond to these challenges? When thinking about the legal dimensions of A2K? To what extent may judicial decisions be capable of addressing complex geopolitical questions of knowledge? How does the development of doctrine unfold in the backdrop of some of these larger structural issues? In the DU photocopy case, questions of access were not articulated in the abstract language of rights and entitlements alone. Instead there was an attempt to bring to the attention of the court facts and statistics about the political economy of knowledge. In the division bench's decision, there is an acknowledgement of some of these issues when the court notes for the record submissions made to it about equitable access and purchasing power parity.[99] However, it goes on to remark that these are matters of public policy best left to the legislature and that a court can only confine itself to statutory interpretation. This kind of judicial restraint is admirable at a time when Indian courts do not hesitate to arrogate for themselves the powers of the executive and the legislature in other spheres. Yet at the same time, it begs the question of how judges, when confronted with legal questions that define the substantive content of access, will respond in the future.

---

[96]Trysh Travis, 'Books in the cold war: Beyond "culture" and "Information"' in Jonathan Auerbach & Russ Castronovo (eds), *The Oxford Handbook of Propaganda Studies* (OUP 2013).
[97]Philip G Altbach, '"Neocolonialism" and Indian Publishing' [1971] 6 *Economic and Political Weekly* 18.
[98]Philip Altbach, *Publishing in India: An Analysis* (Oxford University Press 1975) 33–102.
[99]*Delhi DB* at [62].

To reduce the question of access to a question of grammatical interpretation would be to lose sight of the politics of knowledge distribution, but to base judicial decisions only on political exigencies would also be to lose an opportunity to develop principled reasons that contribute to a long-term jurisprudence of A2K. It is in the preservation of this delicate equilibrium that we may need to reframe the idea of balance in copyright law. The idea that copyright is a system of balances runs the risk of being a cliché. If the idea of balance has thus far been framed primarily in terms of the provision of incentives to authors versus ensuring that the public has access to works, it might be time to acknowledge that the fault lines lie less in pitting the interest of authors against a robust public sphere and more in the structural arrangements of knowledge production, where private monopolies threaten both authors and the public sphere. The parties and the activism that preceded the decisions in the DU photocopy cases are testimony to the fact that academic publishing is certainly a damaged – if not an entirely broken – system in need of urgent reform and on that count the decisions of the DU photocopy case may not be a giant leap for access but they certainly are the first small steps towards it.

Disclosure statement

The author was involved in the campaign as well as a member of the intervention petition filed by the Society for Promoting Educational Access and Knowledge (SPEAK).

Downloaded by [Yale University] at 12:00 04 September 2017