

Jurisprudence of Intellectual Property Rights: Struggle between have and have-nots (Delhi University photocopy case)

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ABSTRACT

Every creation is the effort of multiple hands, created out of the resources held in common. The culture of using it should be made free instead of providing exclusive right to some powerful and influential persons to reduce the exploitation. The paper focuses on the struggle between have and have-nots because of the creation of copyright. The same is highlighted through the DU photocopy copyright case where there is struggle between the students on one hand and publishers on the other hand. Delhi High Court had tried to balance such conflicting and competitive interest of the publishers and the students of the Delhi University. The issue resolved by Delhi Court will be analyzed in term of the idea of Marx, Hegel, Bentham, Locke and Kant. The project aims at analyzing that conflicting and competitive interest with the various jurisprudential theories.

Keywords: Copyright, Free Culture, Jurisprudential Theories.

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Introduction

People in the past have enjoyed the right of collective usage of resources. No one claimed the absolute ownership as it is owned today. The culture was such that no small powerful groups and influential person holds the large amount of resources. One of the reasons being that no one accepts this culture as people do today. It was free. Free culture does not mean that no one owns the property. But there is no single inventor of this creation. There lies effort of multiple hands behind the single creation. Then still why do we accept the absolute claim unquestionably? Is it because of the fact that people claiming absolute ownership is more politically influential person or this shift in thought exemplified that political system is control by few special powerful interests?

Free culture does support and protects the creation and innovation but it does so directly by granting intellectual Property Rights and indirectly by limiting the reach of those rights, to guarantee that follow-on creators and innovators remain as free as possible from the control of the past.² This free culture is against the extremism.

Intellectual property is the right for an extraordinary possibility for many to participate in the process of building and cultivating. It is different from the physical property. It encompasses the right over the property created intellectually. Intellectual Property Rights are regulated by the law in India but these laws should not be allowed to take the path of extremism. It is up to the law to determine up to what extent the protection should be granted. The law is changing and that change is altering the way our culture gets made.³

Copyright is one such intellectual property which allows protection of the literary and artistic work. A person may use the copy by playing it, but he has no right to rob the author of the profit, by multiplying copies and disposing of them for his own use.⁴ The right has travelled from the narrow right to include the restriction on the freedom of others. The exclusive right given to the author or publishers to copy, to distribute, to perform and so on has to be balanced with the competitive interest of the society.

²LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY, (The Penguin Press, New York, 2004).

³*Id.*

⁴Bach v. Longman, 98 Eng. Rep. 1274 (1777).

Delhi University Photocopy Case

In the instant case, a complaint has been filed by the publishers like Oxford University Press, Cambridge University Press United Kingdom, Cambridge University Press India Pvt. Ltd., Taylor & Francis Group, United Kingdom and Taylor & Francis Books India Pvt. Ltd. against the Rameshwari photocopy shop and Delhi University. The Publishers accused the defendant for infringing the copyrights of their publications materials by photocopying, reproduction and distribution on a large scale and circulating among the students and teachers of the university.⁵ The whole case revolves around the issue whether there is infringement of the copyright of the publishers.

The matter was heard by Justice End law in Delhi High Court who ruled that there is no infringement of the Copyright. Therefore, the petitioner appealed and the matter was heard by a division bench. Division bench upheld the decision of single bench. The landmark verdict, which set a precedent for the applicability of copyright law in educational cases in India, held that “copyright in a literary work is not an inevitable, divine or natural right” conferred on an author and the copyright law is intended to increase and not impede knowledge.⁶

The court bought the photocopying under the purview of fair use. It considered it fair under section 52(1)(i) of the Copyright Act, 1957 which provides the reproduction by a teacher or a pupil in the course of instruction.⁷ The clause was interpreted liberally in order to include the university for the teacher and the course of instruction including every activity for imparting the education in the university. Court rejected the claim of absolute ownership and held that the utilization of the copyrighted work would be fair use to the extent it is justified for the purpose of education⁸.

⁵The Chancellor, Masters & Scholars of the University of Oxford & Ors.v. Rameshwari Photocopy Services &Anr. 2016 SCC OnLine Del 6229.

⁶Priyanka Mittal, *DU Photocopy Case: Delhi HC Restores Copyright Suit by Publishers*, *LIVEMINT*, (Dec. 10 2016),

<http://www.livemint.com/Education/RyHIGFZjaktMtGakuAFKuK/Delhi-HC-verdict-on-publishers-appeal-in-DU-photocopy-case.html>

⁷The Copyright Act, 1957, No. 14, Acts of Parliament, 1957.

⁸NamitaSaxena, *DU Photocopy Case: Delhi HC Disposes The Appeal Saying No Triable Issue, Restores Suit But Refuses Interim Injunction*, *LIVELAW*, (Dec. 11, 2016), <http://www.livelaw.in/delhi-hc-disposes-appeal-saying-no-triable-issue-restores-suit-refuses-interim-injunction/>.

Analysis

There are various theories which provides for the justification of the Intellectual Property Rights. Using these theories only, the justification will be provided for the photocopy of the copyrighted books of the publishers. These theories include the Utilitarianism Theory by Bentham, Labor Theory by John Locke, Personality Development Theory by Hegel, Ideology of the Marx and Philosophy of Kant.

Intellectual Property Rights are commonly justified by utilitarianism. Intellectual Rights exist to promote the progress of science and the useful arts by securing to authors and inventors the exclusive right to their respective writing and discoveries for limited times. If people can never recoup their investment, they are unlikely to build a socially optimal invention and as a result everyone loses out the benefit which can be derived from the usage of the creation. Thus, this is the public good problem. IP as a solution provides monopoly by providing a right to the owner to exclude others and enables the owner to charge people for access. It, therefore, provides an incentive to invest in the creation of valuable public goods. The utilitarianism justification for IP ultimately rests on the point that the ability to exclude free rider's inventors and authors would have no incentives to create and therefore IP will be antagonistic to society.

However, if the maximum good of the society fails, IP can't be justified because the interest of society in maximizing welfare prevails over the property right of each creator in her ideas.⁹ Thus in order to provide greatest good of greatest number, the photocopy was allowed. The student's interest will prevail over the owner's interest because education is for the public good and same cannot be allowed to obstruct. The copyright law cannot be extreme in order to impact social welfare by benefits the small group of people who are able and willing to pay for exploiting an innovative idea. Students who cannot afford the expensive books for a semester need not be kept aside because they are the future of the nation.

On the one hand IP law should encourage investment in the ideas and on the other hand should provide social good. Thus, a balance between the have and have-nots needs to be created. Students should not be allowed to struggle for the study materials. Interests of the publishers were protected by quantitative restriction on the photocopied material. The court

⁹Theodoros Papaioannou, *Can Intellectual Property Rights Be Morally Justified? The Case of Human Gene Patents*, 8DIME1, (March 2008).

thus focuses on the welfare of the society rather than serving human wants of individual members.

Locke asserts that all that is in nature is provided by God and it is available to all men as it is held in common for the benefit of all. But when an individual exerts his labour over resources he can claim it as his property because he has added value through his labour. Here only the person's effort is relevant, no less to others, as a precondition for property acquisition. According to him 'The Labour of [Man's] Body and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in the hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property'.¹⁰

One may argue that since the books were the result of the labour of the author, s/he is his private right. But Richards focuses that ideas are the result of social rather than individual creation.¹¹ Indeed, person's labour in creating ideas has to be conceived as a special labour based on interaction and learning within society. What seems to be the case is that although ideas are produced with the contribution of society as a whole, they become alienated under the capitalist framework of private property.¹² Therefore, the students cannot be deprived of the photocopy of the books.

He added a sufficiency proviso according to which rights can be allowed only if it does not deny the others of resources existing in nature. He expressed his concern that if a particular substance is not available in abundance then property rights over it would deny others of access to that scarce resource. He allowed private property rights if it does not cause harm to others and there is enough left for others.

This powerful basis for justifying IPR stated that IPRs are moral-claim rights that each individual naturally has independently of the laws and government of civil society.¹³ But the Delhi High Court strongly disagreed and held that copyrights are not the natural right instead are the statutory rights and can be curtailed by the statute.¹⁴

¹⁰JLOCKE, TWO TREATISES OF GOVERNMENT, 288 (3rd ed., Cambridge University Press, Cambridge, 1988).

¹¹D.G. Richards, *The Ideology of Intellectual Property Rights in the International Economy*, 9 REVIEW OF SOCIAL ECONOMY 521, 531(2002).

¹²K MARX, EARLY WRITINGS, (Penguin, London, 1975).

¹³ J Hughes, *The Philosophy of Intellectual Property*, 77 THE GEORGETOWN LAW JOURNAL 287, (1988).

¹⁴The Chancellor, Masters & Scholars of the University of Oxford & Ors.v.Ramesh Wari Photocopy Services &Anr. 2016 SCC OnLine Del 6229.

Absolute IPRs are not morally justified on the grounds of the Nozickean reformulation of the Lockean proviso which stresses for the complementary principle of compensation: ‘someone whose appropriation otherwise would violate the proviso still may appropriate provided he compensates the others ...’¹⁵ A student studying in Delhi University pays a tuition fee varying from ₹400 to ₹1200 to make the education affordable. The necessity to buy costly books would defeat the purpose and thus, to serve the purpose coursepack are the best option. A student cannot be expected to buy all the books and therefore, can never be said to be the potential customer of the plaintiff.

Marx always criticized the creation of Capitalized society where few owns the resources and exploits the one who are struggling to receive the benefits of the resources. Marx would have found the IPR as a tool in the hands of the capitalist to exploits the commoners. He wants the communal use of the property. So, will the students be considered to be exploitative if the photocopy would not have been allowed? Why can’t be students be allowed to use the books in the form of a course pack? If photocopy won’t be allowed, then the students would have been left at the mercy of the publishers who would be charging the exorbitant rates.

Value that is created from labour becomes embedded in the commodity. These commodities are then sold in the marketplace and profits are made and this ensures the continued success of global capitalism, whilst labour is exploited, alienated and objectified.¹⁶ The logic of capitalism is the commodification of all that surrounds us.¹⁷ Now, we are seeing this process starting to take effect in areas like schools, universities and libraries. These are areas that were previously thought to be something beyond commercialization and trading.

It is true that value is embedded in the books but while publishing the books; it is not only the publisher owner but the laborer as well who contributes towards the printing of the books. Furthermore, Rameshwari Photocopy Shop also put labour in photocopying who did not compete with the publishers. And making the education as a commodity will be against the tradition of India. Therefore, the Court has rightly seen the education as fair use of the copyrighted material.

Next come the personality theory of the IPR according to which, any work or an invention would belong to its author or inventor because it is the manifestation of the creator or

¹⁵R NOZICK, ANARCHY STATE AND UTOPIA, 178(Blackwell, Oxford, 1974).

¹⁶Ruth Rikowski, *A Marxist Analysis of the World Trade Organisation’s Agreement on Trade-Related Aspects of Intellectual Property Rights*, 4 POLICY FUTURES IN EDUCATION 396, (2006).

¹⁷*Id.*

inventor's personality. Hegel in his book *Elements of Philosophy of Right* states that the individual's will should be given more importance compared to other elements that make up an individual. When an individual express himself through his work it is nothing but an external manifestation of his personality. Kant also focuses on the importance of individual autonomy. Unlike Locke, instead of labor, one's will or personality is seen to be mixed with or manifested in an external thing.

Here, individual is preferred at the cost of society. As Merges makes explicit, "society ought to bear [the] slightly higher transaction costs" that result from a focus on the exclusive rights of individual creators"¹⁸. If we go strictly by the Hegel and Kantian viewpoint, the decision would not appear flawless. It is true that the books are manifesting the will of the authors and publishers but the author's personality is already enhanced. Should not the personality of the students be enhanced? What is the use of the copyrighted books if the same cannot be used for the educational purpose by the students, if the same is not successful in disseminating the information to the students? In country like India, where 25% of the people leave below poverty line could be expected to bear the huge cost on education?

Hence, it could be seen that if we interpret the decision of the High Court in terms of philosophical argument given by various philosophers, the judgement can be justified in favor of photocopying. Also the Court has balanced the interest of the publishers as well. It is not the full book that the course pack includes but only a margin of the book is photocopied. The arguments can also be interpreted in the way to justify the stand of publishers to some extent but the value attached to the education and public interest overrides the other interest.

Conclusion

Development of intellectual property rights is strongly advocated by the individualistic thinking. This individualistic thinking has divided the society into parts, have and have-nots. Intellectual Property Rights if allowed to be extreme will surely create a struggle between have and have-nots. The balance between the IPR and the society has to be created. The have-nots have to be protected because of the modern welfare state concept.

The property right that is copyright is no longer the balanced right that it was, or was intended to be. The property right that is copyright has become unbalanced, tilted toward an

¹⁸ROBERT P MERGES, *JUSTIFYING INTELLECTUAL PROPERTY*, (Harvard Univ Press, 2012).

extreme. The opportunity to create and transform becomes weakened in a world in which creation requires permission.

DU Photocopy case is the case about the future of the education. Thus, the Delhi High Court comes into picture and created a balance so that copyrights should not be allowed to be extreme. The Court created the balance between the have and have-nots who are the publishers and students respectively. Rights of authors and owners are balanced with the competing interest of the society. Some books are so costly that they are out of reach of students to enjoy benefits. There must be justice in the society. And it is the justice that is done by the Court. In today's modern world, it prevents the powerful group from exploiting the masses by exerting or adding value to the resources which are held in common.

The extent of the fair use exception in copyrights law would be to facilitate access to knowledge in a situation where learning material are extremely expensive and in a country as sharply divided like India is, the decision can have a great impact on the ability of the student to access learning material.