CELEBRATED PUBLISHERS PROPAGATE 'INFORMATION FEUDALISM'

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With each passing year, we might well be on our way towards a prediction made in the lines of information being controlled and monitored by the few coming true. This prediction in the form of theory, when applied to the infamous lawsuit by the celebrated publishers of OUP, CUP and Taylor & Francis's challenge to the alleged crime of a photocopier at Delhi University for unauthorized reproduction and issuance of copies of their academic publications, shows an unhealthy trend of a few intellectual property hyper-enthusiasts advocates standing in the way of the larger picture of education dissemination to the masses. This article analyses the shortcoming of the arguments of the publishers while emphasizing the characteristics of feudalism in such situations.

Introduction: Understanding the Dilemma

An unsettling story describing the onset of a so called "information feudalism" by the year 2015 was predicted with uncanny accuracy as far back as 1995.[1] Peter Drahos, the narrator of the story, provided a pessimistic vision of the future, in which the information age will be ruled by the private owners of intellectual property. Wherein a small number of states will dominate the emerging [intellectual property rights] international regulatory order. As the years pass this dreadful perdition may soon come true. An integral compo-

1 Peter Drahos, "Information Feudalism in the Information Society," *The Information Society* 11 (1995): 209. Numerous work has subsequently mushroomed from the borrowed term of "Information feudalism" however, for the purposes of this article, the following are relevant. See, Noha Abdel Meguid El Labban, "Copyright: A Roadblock to Education in Developing Countries?" (Ph.D. diss., The American University in Cairo School of Global Policy and Public Affairs, 2013), Steve Fuller, "Can Universities Solve the Problem of Knowledge in Society without Succumbing to the Knowledge Society?," *Policy Futures in Education* 1, no. 1 (2003): 106. Margaret Chon, "Intellectual Property and the Development Divide," 2813 *Cardozo Law Review* 27, no. 6 (2006): 2813, Keith H. Maskus and Jerome H. Reichman, "The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods," *Journal of International Economic Law* 7, no. 2 (2004) 279-320.

nent of which resonates is the fact that abstract objects including information have become the most important kind of factor of production one can own in the knowledge economy of today.[2] The traditional modes of production such as labor and land now fall short of the importance accredited to information. As a result of the increasing importance of information as capital, when new abstract objects fell into the ownership of this rather small group of people, there emerged the problems of inequalities in distribution of intellectual property.[3] The proprietary control of abstract objects will lie, in all probability, with the intellectual property-maximalist regime countries. A possibility might arise where the fountainhead of power will be based not on the sharing of information but by coercive control through law.

The Curios Case of the Rameshwari Photocopiers

The coercive control through law is amply displayed in the allegations brought by the lawsuit of *The Chancellors, Masters and Scholars of Oxford University and Ors. v. Rameshwari Photocopy Service and Anr.* in the High Court of Delhi before a single bench of the court.[4]

The facts leading up to this case revolve around a surprise litigation instituted in August 2013 by three venerable presses – The Oxford University Press (OUP), Cambridge University Press (CUP) and Taylor & Francis, against Rameshwari Photocopying service - a licensed store on the precincts of the University of Delhi (DU), with DU being arrayed as a party. The publishing companies alleged that the photocopier's act of supplying photocopies of course material (photocopied compilations of parts of reference books) to students enrolled in various programs in the University of Delhi was a violation of the copyright of the publishers to the amount of 6 million Indian Rupees. A fundamental legal issue at the core of the lawsuit is whether the copying was done for a permissible purpose, meaning thereby as to whether the act of photocopying portions of the copyrighted material falls within the purview of "fair dealing." Interestingly, the Copyright Act, 1957 by virtue of Section 52 clearly provides that "certain acts [should] not be [considered as] infringement of copyright" and lists out these acts to include those for "private use, including research" [Section 52 (1) (i)] and "the reproduction

2 Thomas Stewart, *The Wealth of Knowledge: Intellectual Capital and the Twenty-first Century Organization,* (USA: Utopia Limited, 2001). See also, generally, Sebastian Haunss and Kenneth C. Shadlen (eds.), *Politics of Intellectual Property Contestation Over the Ownership, Use, and Control of Knowledge and Information* (UK: Edward Elgar, 2009).

3 Robert O. Keohane and Joseph S. Nye, *"Power and Interdependence in the Information Age,"* Foreign Affairs, 77, no. 5 (Sep. - Oct., 1998): 81.

4 CS (OS) no. 2439/2012.

of any work – (i.) By a teacher or pupil in the course of instruction." In other words, Section 52 (1) acknowledges that in certain instances, using, reproducing, distributing parts of a copyrightable work, *without* making payments to the copyright holder, is necessary and permissible, thereby removing any ambiguity about the "permissibility" aspect. Despite this unambiguous provision, the publishers managed to obtain a temporary injunction to stop the photocopiers. The very fact that Section 52 (1) of the Copyright Act, 1957 provides protection to researchers, teachers and students for *non-commercial* use is enough for photocopying of educational material to be made legally tenable. The non-commercial aspect is the most potent point in this challenge. According to this section, students, teachers and researchers cannot not use the material for commercial purposes and is to be utilized only for educational purposes. The allegation that the photocopier made profits is invalid. Without the photocopier, there could be no affordable and cheaper means of reproduction of the material and hence no effective application of the protection accorded in Section 52. Understandably, photocopying is not the only method of material reproduction but it remains by far the cheapest and most accessible method, especially in the absence of any other form of institutional infrastructure to provide technological means of reproduction. Additionally, Liang says, and correctly so, that the mere assertion of an absolute claim by the copyright owner does not make public interest exceptions such as the "fair-dealing" execptions in Section 52 disappear.[5] Interestingly, the "fair dealing" exception in the UK Copyright, Designs and Patents Act (1988), allows "fair dealing" with copyrighted material without prior permission of either the author(s) or copyright owners for the purposes of non-commercial "research or private study,"[6] while the plaintiffs sue the defendants for the very same reasons. Also, even a pro-intellectual protection regime country like the US gives the liberty of 10 percent copying

5 Lawrence Liang, "Exceptions and Limitations in Indian Copyright Law for Education: An Assessment,"*The Law and Development Review* 3, no. 2 (2010): 198.

6 Section 29, the Copyright, Designs and Patents Act 1988:"Research and private study (1)Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.(2)Fair dealing with the typographical arrangement of a published edition for the purposes mentioned in subsection (1) does not infringe any copyright in the arrangement. (3)Copying by a person other than the researcher or student himself is not fair dealing if (a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or (b)in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose."

as "fair dealing".[7]

The focal point of the suit is contained in the fervent mention by the plaintiff publishers for an Indian Reprographic Rights Organization (IRRO) licence – agreements from which tens of millions remain to be made, as asserted in the petition made by the plaintiffs. Particularly, the IRRO licence can even take the form of retrospective application, leading to monetary profiteering.

The collection of flawed arguments by supporters of publishers includes the assumption that every photocopy is a lost sale; while on the other hand, the concept of differential pricing does not seem to go down well with the publishers.[8] Given the current pricing strategy, there is no reason to believe that students are the primary market for these books, as the price is beyond the reach of a huge majority and hence it would be insincere to presume that every photocopied article or book would be a lost sale.[9] The embodiment of intellectual property rights to country-specific legislature is not just an indicator for territorial and jurisdictional convenience but has to be read to mean "contemporary community standards."[10] Interpretation of the law

7 For more, see, Shamnad Basheer, "Why Students Need the Right to Copy," The Hindu (April 26, 2013) http://www.thehindu.com/opinion/op-ed/why-students-need-the-right-to-copy/article4654452.ece. (accessed January 18, 2014). He writes: "What makes th[is] lawsuit particularly egregious is the fact that [these] publishers are effectively seeking an outright ban on all course packs, even those that extract and use no more than 10 per cent of the copyrighted book. [Even though] [u]nder U.S. law, reproducing up to 10 per cent of the copyrighted books is "fair use" of a copyrighted work, and therefore legal. Given that India is a developing country, with poorer students and more severe educational access constraints, it stands to reason that Indian courts ought to peg this number at 30 per cent or even higher."

8 The practice of charging different prices to different buyers for the same quality and quantity of a product, wherein the differentiation is based generally on the stage of development of the country thereby reflective of the country's ability to pay (as measured by their level of income). The structure of differential pricing enables low income countries access to, in this case, books. For more, see, William Fisher and Talha Syed, "Differential Pricing," http://cyber.law.harvard.edu/people/tfisher/Drugs_Chapter6.pdf. (accessed on January 19, 2014),where they argue in favour of differential pricing with respect to pharmaceutical products.

9 Inputs from the letter (dated March 9th, 2013) in protest against the petition by the publishers signed by 309 authors and academicians. See, http://spicyip.com/docs/DU percent20Photocopying percent20case/Letter-to-Publishers- percent28including-List-of-Signatories percent29.pdf. (accessed on January 19, 2014).

10 The use of the words 'contemporary community standards' is used in the context of the inability of the web publishers to restrict access to their website based on geographic locale of the site visitor. The measurement of obscenity, for example differs from one locale where community standards differ substantially from the rest of the nation. What is considered obscene in one part of the world might not be considered obscene in another. These standards are generally, itemized in a list that sets the state's community values.In the argument of accessibility of books and reading material, the contemporary community standard should weigh heavily in the context of deciding such matters based on the prevalent situations of a nation, including income analysis, standard of living, etc.

according to the place of implementation also forms the cornerstone for a flourishing law. Furthermore, there have been reports that a host of university libraries have only up to three copies of a book, which are shared by hundreds of students. In such circumstances, we cannot apply the first-cum-first rule to the issuance of library books by students for dissemination of education. Is the principle that the students capable of receiving one or more the reference books first will be the only ones entitled to its resources, a sound one? Expanding our libraries is an altogether different issue and students need to be provided with resources for that unspecified amount of time. In view of all such existing conditions, course packs have been long recognized as an institutional practice to ensure accessibility of learning material to all students.

The fact that two of the three publishers are backed by prestigious educational institutions makes the legal challenge all the more disturbing. The institutional backing is ground enough for them to be less vengeful against student consumers. Ironically, amongst the most cherished of CUP's values are "trust and collaboration" and it supposedly aims to advance "learning, knowledge and research worldwide."[11] OUP, a department of the University of Oxford states that it "furthers the university's objective of excellence in research, scholarship and education by publishing worldwide" stands as a hypocrisy in the face of the current law suit.[12] The intermingling of the ethic of the market with the educational publishing houses ethos that one can only deserve access to knowledge if one can put down the money for it does not resonate with any intention of educating the masses.

An Attempt at a Conclusion

With The Right of Children to Free and Compulsory Education Act (2009) stressing mandatory education for children between the age group of six to fourteen, universities will soon have to cope up with a larger number of students demanding education and enrolling for higher education in the near future. Accessibility of books necessary for dissemination of education will then grow in leaps and bounds, and any hindrance thereof will result in a fractured educational structure denying quality education while over-emphasizing on the quantity. Additionally, an increased isolation of reading material as the one advocated by the promoters of the suit can explicitly result in a restriction to and access of reading material from the flow of informa-

11 Official Website of CUP. See, http://www.cup.cam.ac.uk/. (accessed January 19, 2014).

12 Official Website of OUP. See, http://global.oup.com/about/?AB=B&cc=in. (accessed on January 19, 2014).

tion, an aspect so very vital to the growth of the young generation. In such an atmosphere, for the publishers to advocate "a case for violation of copyright act, is indeed a challenge to a decades old practice in a university, rather than targeting the sale of pirated copies of their books in grey market."[13] Not to forget this litigation too is marred by the erstwhile practice of "feudalism," wherein the dynamics of power play between the feudal lords, the vassals and the peasants (serfs) flourished. The serfs were obliged to serve on their lords' land in addition to paying homage to the lord, all in exchange, notionally, for protection; thereby enslaving themselves. This structured society, derived by virtue of relationships from the holding of land in exchange for service or labour is reflective of the modes and means exercised by countries in staunch support of their intellectual property to boost their economy and make other countries dependant on their intellectual property. The privileges and prerogatives of these countries will hence be considered as paramount resulting, in the near future, the reinforcement of serfdom. The control of the feudal lords over land thereby leading to the peculiarness of the society based on the exploitation of the peasants who farm these lands, typically under serfdom.

Closed linked with which is the "knowledge economy" era where intellectual property rights are increasingly recognized as an integral component of one's asset, The continued assertion that the practice of 'institutionally supported mass photocopying' is the 'death knell' for educational publishing is nothing more than an abomination. As argued by Joseph Stiglitz, societal inequalities are a result not just of the laws of economics, but also aspects of the legal system.[14] Here, it is the intellectual property regime that contributes needlessly to the gravest form of inequality, and hence the accessibility to educational facilities should not be contingent solely on the ability to pay.

In a world largely leaning towards governance based on the doctrine of concentration of ownership of knowledge and information as against concentration of wealth, this case raises the bar of all further intellectual property rights cases by imposing the beginning of 'information feudalism' in India. We may soon find that our freedom of accessibility is limited by those

13 Danish Raza, "DU Students Photocopying Academic Books is Legal," Firstpost India, (August 31, 2012) http://www.firstpost.com/india/du-students-photocopying-academic-books-is-legal-437852.html?utm_source=ref_article. (accessed on January 19, 2014). See also, The Supreme Court in Francis Coralie Mullin v. The Administrator, Union of Delhi & Ors. 1981 AIR 746 SC, held that the right to life in Article 21 is not just about physical survival but includes the right to facilities for reading, writing and expressing oneself in diverse forms.

14 Joseph E. Stiglitz, "How Intellectual Property Reinforces Inequality," The New York Times (July 14, 2013) http://opinionator.blogs.nytimes.com/2013/07/14/how-intellectual-property-reinforces-inequality/?_php=true&_type=blogs&_r=0. (accessed January 19, 2014).

who own property rights in these materials. We have to religiously advocate democratic property rights while mourning over the demise of the world's intellectual commons. Peter Drahos warns that "the international regime for intellectual property protection is increasingly circumscribing the freedom of developing countries to set efficient standards of protection for their economies".[15]

Can we, then, justify our constitutional stand of a "welfare state"? Without clouding the debate with any nationalistic fervour, contentious issues like these need to addressed while keeping in view the pulse of the nation, in this case, as a promising developing nation. As Prof. Amartya Sen rightly stresses when he says that "educational publishers have to balance various interests, and the cause of education must surely be a very important one."[16] This is an aspect of immense concern in lawsuits such as the pending litigation. Without this sense of balance it might as well be "feudalism" all over again. **Y**

15 Peter Drahos, "An Alternative Framework for the Global Regulation of Intellectual Property Rights," *Australian Journal of Development Studies* 21 (2005): 44.

16 Amartya Sen's letter to OUP dated Sept.12, 2012.