GOVERNMENT COPYRIGHT IN SCHOOL TEXTBOOKS AND THE FUNDAMENTAL RIGHT TO EDUCATION

Anupriya Dhonchak and *Rahul Bajaj*[1]

Introduction

The pandemic has compelled us to undertake many activities online and education has been no exception. There is no gainsaying the fact that education has the potential to be a significant means to counteract inequalities. And yet, the manner in which online education has been delivered in recent times has brought into stark relief, and further exacerbated, the digital divide and widening socio-economic inequalities in the country. Only around a quarter of Indian families have access to the internet, according to estimates.[2] This percentage reduces to 15% in rural homes. As usual marginalised, rural, and destitute communities have been hit the hardest. There have even been multiple reported cases of suicides by students in the country on account of lack of access to education during the ongoing pandemic.[3]

There should therefore, be a renewed and urgent emphasis on the need to make education, online or offline, more inclusive. Equitable access to learning material and textbooks for education constitutes a basic requirement for the realisation of this goal. However, access to textbooks in India has been riddled with distribution problems at the best of times, and the pandemic has only increased the impact of differential access. Against this backdrop, this paper explores the issue of the government's copyright ownership in State Board textbooks, and its implications on access to knowledge and education.

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[1] Anupriya Dhonchak is a B.A. LL.B. (Hons.) graduate of National Law University Delhi, and is currently reading for the Bachelor of Civil Law at the University of Oxford as a Rhodes Scholar [India and Balliol, 2021].
Rahul Bajaj is a Senior Resident Fellow at the Vidhi Centre for Legal Policy and was a Judicial Law Clerk to Justice D.Y. Chandrachud in the 2020-2021 court year. The authors would like to thank the peer reviewer for their comments, Natasha Singh and Krishnanunni U for their research assistance, as well as the Board of Editors at IJCL for their editorial assistance.

[2] Sam Pitroda, 'Digital India Is Not Prepared for Digital Education' The Indian Express (3 Sept. 2020) <https://indianexpress.com/article/opinion/columns/digital-education-online-classes-learning-coronavirus-national-education-policy-6580744/> accessed 1 February 2022.

[3] Abdul Latheef Naha, 'Kerala Class X Girl Ends Life Allegedly over Lack of Access to Online Classes' The Hindu (Malappuram, 2 June 2020) <https://www.thehindu.com/news/national/kerala/kerala-class-x-girl-ends-life-allegedly-over-lack-of-access-to-online-classes/article31728470.ece> accessed 1 February 2022; Sukrita Baruah, 'LSR Student Suicide: No Laptop to Hostel Stay, Key Concerns Were Flagged to College Admin by Students' The Indian Express (10 November 2020) <https://indianexpress.com/article/cities/delhi/lsr-student-suicide-no-laptop-to-hostel-stay-key-concerns-were-flagged-to-college-admin-by-students-7034481/> accessed 1 February 2022.

To this end, in **Part I** of our analysis, we outline the rationale behind vesting copyright ownership with the government for school textbooks. In **Part II**, we highlight the scope, potential and limits of user rights under the Indian Copyright Act, particularly for the purposes of making learning materials available in the context of the pandemic. Based on this, in **Part III**, we underscore the fashion in which the copyright policies of some state governments, which cover the content of school textbooks, impede, as opposed to facilitating, access to education. In particular, we analyse how restrictive licensing conditions in these policies, which gatekeep government owned copyrighted material, serve as fetters to ensuring meaningful access to these materials. After having clearly identified the problems at hand, our focus will switch to offering a blueprint for a solution to these problems that is grounded in a rights-based framework. In this regard, in part IV, we will analyze Indian case law that outlines the contours of the Right to Education ["RtE"]. This analysis will lay the groundwork for a discussion on the fashion in which, as the owner of copyright over educational materials, the state must comply with its obligations under the RtE. Thus, we will argue that textbooks in which copyright is owned by the government should be made available via Creative Commons (CC) Licenses that allow for commercial and non-commercial re-use while ensuring the integrity of the work, and ultimately fulfilling the goal of wider public dissemination of educational material. We will finally conclude that this approach ensures the practical operationalization of the RtE in a manner that holds the government accountable for complying with the obligations that the right entails.

I. Government's Role as Publisher and Copyright Owner

India has played a pivotal role in making knowledge available to the public by emphasising the need for broad exceptions for educational access within its copyright law and negotiating for the framing and interpretation of international treaties in a manner that is aligned with the needs of developing countries.[4] The Government's involvement in publishing is historically rooted

[4] Prashant Reddy T and Sumathi Chandrashekaran, 'New Delhi Challenges the Berne Convention', *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* (OUP 2016); Vishal Rakhecha, 'Works of the Indian Government' The Internet Archive (2020) <http://archive.org/details/works.of.indian.government> accessed 1 February 2022.

in increasing accessibility of knowledge for the public,[5] and to some extent, in efforts towards national integration or nation building.[6]

The National Council of Educational Research and Training (NCERT) was established by the government in 1961. By the late 1960s, all of India's states had established their own (state) textbook boards. The NCERT created model textbooks for schools and for publication and adoption by these state textbook boards. This ushered in a new trend in the country's publishing business, which had previously been dominated by private publishers.

The government's role as a publisher can allow it to set affordable prices and distribute widely. This objective to increase accessibility of education has now been constitutionalised as the Right to Education (RtE), recognised by the Supreme Court[7] and codified by a constitutional amendment.[8]

The publication of textbooks by state governments via state boards[9], and by the Central Government via the NCERT[10] are a part of this endeavour. As pointed out by R.R. Diwakar to Bhopinder Singh Man during the Constituent Assembly Debates, these initiatives were motivated by social interest goals, and hence, they were reliant on government support[11], and designed to only recoup costs for printing and distribution, for their sustenance.[12]

Rewarding knowledge production and creative effort through maximising commercial advantage via exclusive rights, is an incentive that does not apply to government works whose

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[5] TS Krishnamurthi 'Promoting book production: Role of the Government of India' (1972) 19(1) Annals of Library and Information Studies <http://nopr.niscair.res.in/bitstream/123456789/28236/1/ALIS%2019%281%29%205-11.pdf> accessed 1 February 2022; Public Accounts Committee, 'National Book Trust: Ministry of Human Resource Development (Department of Education)' <http://10.246.16.188:80/handle/123456789/4841> accessed 1 February 2022; National Council of Educational Research and Training, 'Review of Education in India (1947-61): First Year Book of Education' <http://14.139.60.153/handle/123456789/4602> accessed 1 February 2022; Estimates Committee, 'Twelfth Report on All India Radio (1954-55) Pertaining to Ministry of Information and Broadcasting' <http://10.246.16.188:80/handle/123456789/56670> accessed 1 February 2022; Coonoor Kriplani, Building Nationhood through Broadcast Media in Postcolonial India (2017) 22(1) Contemporary Postcolonial Asia, <https://www.asianstudies.org/publications/eaa/archives/building-nationhood-through-broadcast-media-in-postcolonial-india/> accessed 1 February 2022.

[6] Committee, 'Twelfth Report on All India Radio (1954-55) Pertaining to Ministry of Information and Broadcasting' (n 5); Kriplani (n 5).

[7] *Miss Mohini Jain v State of Karnataka and Ors*, 1992 AIR 1858.

[8] The Constitution of India, 86th Amendment, 2002.

[9] National Council of Educational Research and Training, 'Survey of School Textbooks in India 1969-70' (1970) <http://14.139.60.153/handle/123456789/4408> accessed 1 February 2022.

[10] National Council of Educational Research and Training (n 5) Objects of the Council, pg xxxv.

[11] Constituent Assembly of India Debates (Legislative), Question and Answers – Part I, Answer by R.R. Diwakar to Bhopinder Singh Man on Publications Division (15 December 1949) <http://10.246.16.188:80/handle/123456789/761566> accessed 1 February 2022.

[12] Sahitya Akademi, 'Publication Policy' (Sahitya Akademi Website) <http://www.sahitya-akademi.gov.in/policies/publication_pricing_policy.jsp> accessed 1 February 2022.

primary motivation for creation is public dissemination.[13] In the case of government copyright in school textbooks, the incentivising of production via exclusive rights is not so important given that the government would have published these books even if there were no copyright protection. However, it may be argued that the government boards may need revenue to sustain the activity of knowledge production itself, even though many states have begun policies to make textbooks available for free.[14] Further, the cost of production of a specific work can be easily determined. However, the benefits that accrue via public dissemination of that work are harder to ascertain since they are intangible in nature.[15] Public dissemination of textbooks is no longer a charitable benefit but a prerequisite to the realisation of a fundamental right, the RtE, as we shall indicate in **Part IV** of this paper. Further, as we shall subsequently show, the existing jurisprudence on the RtE makes it clear that the government cannot cite financial constraints as an excuse for its failure to secure its enjoyment.[16] Therefore, the need to ensure widespread dissemination of government-owned textbooks has to take precedence over extracting financial returns from such textbooks.

As Vishal Rakhecha notes, even commercial re-use of these textbooks (with the adequate pricing regulations and suitable CC licenses to ensure affordability for students and encourage creativity for creators respectively) would promote the increased interaction between the public and the educational material.[17] Printed copies, adaptations or publications that add to existing material would only widen the dissemination of these works. If local publishers are not charged hefty royalties or licensing fees, they can make these books available at cheaper prices and

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[13] Anne Fitzgerald, 'Crown Copyright' in B Atkinson and B Fitzgerald (eds.), *Copyright Future Copyright Freedom: Marking the 40th Anniversary of the Commencement of Australia's Copyright Act 1968* (Sydney University Press 2011); Pranesh Prakash, 'Copyrights and Copywrongs Why the Government Should Embrace the Public Domain' The Centre for Internet and Society (21 August 2013) <https://cis-india.org/a2k/blogs/yojana-august-2013-pranesh-prakash-copyrights-and-copywrongs-why-the-govt-should-embrace-the-public-domain> accessed 1 February 2022.

[14] Manmath Nayak, 'Free Textbooks Will Be Provided to Students From Class 6 to 12, Says Education Minister' India.com News, 26 February 2021) <https://www.india.com/education/free-textbooks-will-be-provided-to-students-from-class-6-to-12-says-education-minister-4454356/> accessed 24 November 2021; Hepzi Anthony, 'State to Provide Textbooks to Private Aided, Government School Students' The Hindu (16 March 2017) <https://www.thehindu.com/news/cities/mumbai/state-to-provide-textbooks-to-private-aided-government-school-students/article17468775.ece> accessed 1 February 2022; 'Process of Free Textbook Distribution among Assam Students Begins' The Shillong Times (2 June 2021) <https://theshillongtimes.com/2021/06/02/process-of-free-textbook-distribution-among-assam-students-begins/> accessed 1 February 2022.

[15] National Research Council, Public Sector Information, 'The Socioeconomic Effects of Public Sector Information on Digital Networks: Toward a Better Understanding of Different Access and Reuse Policies' (The National Academies Press 2009) <https://www.nap.edu/catalog/12687/the-socioeconomic-effects-of-public-sector-information-on-digital-networks>.

[16] *Avinash Mehrotra v Union of India* (2009) 6 SCC 398 [29]; Also see *State of Bihar and Ors. v The Bihar Secondary Teachers Struggle Committee, Munger & Ors.* (2019) 18 SCC 301 [78].

[17] Rakhecha (n 4).

reduce their distribution costs. Further, scanning and uploading books on repositories like the Internet Archive which permits optical character recognition, allows for better discoverability via search engines as well as greater access for the visually impaired.[18]

Access to textbooks in India has not improved adequately despite increasing access to the internet and smartphones. As per the Annual State of Education Report (ASER) survey findings in September 2020 (covering 52,227 rural households with school age children in 30 States and Union Territories), around 20% of rural children across the country have no textbooks at home. Smartphone ownership levels among rural households with school going children have doubled to 62% in 2020 from 36% in 2018.[19] However, one-third of children with smartphones and two-thirds of children nationwide did not have access to any learning materials.[20] Interestingly, WhatsApp was the most commonly used mode of sending learning materials to students, with 75% of students who received some input, getting it via the app.[21] This reveals the importance of having easily downloadable textbooks and interactive material on the internet as well as copyright policies that do not impede their being transmitted to students electronically. Further, the lack of meaningful access to educational materials cannot be squared with the state's obligations under the RtE. It therefore becomes imperative to use the RtE as the prompt to help reverse this state of affairs, as we shall discuss in **Part 4**.

The launch of the Digital Infrastructure for School Education (DIKSHA), the Ministry of Human Resource Development's (MHRD) ambitious digital learning portal, in Tamil Nadu was upgraded via embedding QR codes in textbooks for Grades 1, 6, and 9 (later expanded to cover all grades, and also replicated across other States). Each QR code was linked to a content module hosted on the DIKSHA platform, which contains a video, animation or a quiz to allow students to grasp particular concepts. These QR code enabled textbooks were reported to have helped students in each of the 45,000+ government schools in Tamil Nadu[22] to access digital content as long as they had access to basic internet and a smartphone.[23] This demonstrates that

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[18] Prakash (n 13).

[19] 'Nearly 20% of Rural School Children Had No Textbooks Due to COVID-19 Impact, Finds ASER Survey' The Hindu (New Delhi, 28 October 2020) <https://www.thehindu.com/news/national/coronavirus-20-of-rural-school-children-had-no-textbooks-due-to-covid-19-impact-finds-aser-survey/article32966299.ece> accessed 1 February 2022.

[20] Id.

[21] Id.

[22] Aparna Ramanujam, 'DIKSHA: The Long-Awaited Antidote to India's Education Crisis?' The Bastion (16 December 2019) <https://thebastion.co.in/politics-and/diksha-the-long-awaited-antidote-to-indias-education-crisis/> accessed 1 February 2022.

[23] ibid. However, it is also important to note that only 17.9% of the total government schools in Tamil Nadu have an internet facility as per the Unified District Information System for Education (UDISE+) Report for 2019-20. See A. Raghu Raman, 'Less than 20% of Tamil Nadu Govt Schools Have Internet' The Times of India (10 July

digitising access to textbooks can enhance accessibility. As a result, this was rapidly scaled up across the country, and the MHRD, in a letter in 2020 to the NCERT, asked it to prepare QR code enabled textbooks.[24] E-contents in sign language as well as audio lessons for children with disabilities have also been uploaded on multiple DIKSHA portals.[25] However, the DIKSHA scheme is still at a formative stage in many states. In Assam, for instance, only 37 textbooks have received QR codes so far. Currently, activities are ongoing for modifying 152 textbooks in 2021 in 5 select languages: Assamese, English, Bodo, Bengali and Hindi.[26]

Other government initiatives to mitigate device availability and connectivity issues include sharing of videos of classes by instructors over WhatsApp or YouTube so that students can access these at their convenience. After the announcement of the lockdown period in India, commencing March 23, 2020, SWAYAM (Study Webs of Active learning for Young Ambitious Minds), an online learning platform run by the MHRD, has attracted at least 50,000 new subscribers.[27] SWAYAM Prabha DTH channels allow pre-recorded sessions to be aired on television and radio (via All India Radio). SWAYAM's growth can be attributed to the provision of free access to top learning resources.[28] Previously, SWAYAM classes were time-limited and required advance enrolment. Students, parents, and instructors can now utilise these platforms for free to make the most of the lockdown period. Every day, more than 50,000 individuals watch the videos on SWAYAM Prabha DTH TV channels.[29] Similarly, the National Digital Library is now being used by almost 43,000 people each day, which is more than double the usual number of users that accessed it.[30]

However, hosting learning materials over online platforms whose videos are available for free may lead to copyright concerns. Such concerns can arise if the material being taught is from a

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2021) <https://timesofindia.indiatimes.com/city/chennai/only-20-of-tn-govt-schools-have-internet/articleshow/84278093.cms> accessed 1 February 2022.

[24] Kritika Sharma, 'NCERT textbooks to turn smarter with QR codes, syllabus set to be revised' The Print (27 June, 2020) <https://theprint.in/india/education/ncert-textbooks-to-turn-smarter-with-qr-codes-syllabus-set-to-be-revised/449230/> accessed 1 February 2022.

[25] Rajlakshmi Ghosh 'E-content for children with special needs must be diverse and flexible' Times of India (23 June, 2021) <https://timesofindia.indiatimes.com/home/education/news/e-content-for-children-with-special-needs-must-be-diverse-and-flexible/articleshow/83771537.cms> accessed 1 February 2022

[26] 'DIKSHA and Energized Textbooks for Elementary Secondary and Higher Secondary Level' Government Of Assam, Elementary Education, SCERT <https://scert.assam.gov.in/frontimpotentdata/diksha-and-energized-textbook> accessed 1 February 2022.

[27] 'Lockdown Impact: Government's e-learning platforms witness surge in subscribers' ET Government (29 March 2020) <https://government.economictimes.indiatimes.com/news/education/lockdown-impact-governments-e-learning-platforms-witness-surge-in-subscribers/74870839> accessed 1 February 2022.

[28] ibid.

[29] ibid.

[30] ibid.

State Board textbook, the licensing of and copyright in which is aggressively protected. Hence, in the following section we examine the scope and limitations of user rights for education under Indian Copyright law.

II. User Rights for Education under Indian Copyright Law

Section 52(1)(i) allows the reproduction of any work by a teacher or pupil in the course of instruction. J. Endlaw on the Single Bench of the Delhi High Court held in the *DU photocopy* case that rights under S.52 of the Copyright Act are meant to facilitate public access to information.[31] Therefore, they are to be interpreted expansively, instead of narrowly as exceptions to infringement (S.51).[32] The Division Bench in the case affirmed J. Endlaw's position that S.52(1)(a) which was a general provision would not widen or restrict the scope of S.52(1)(h), S.52(1)(i) and S.52(1)(j) which constitute special provisions covering the field of education/instruction. Without determining whether 'in the course of instruction' was a phrasal verb or noun, the Court held that it should be widely interpreted as the entire process or programme of education as in a semester.[33] It also held that this would include the pre-reading of materials distributed prior to class to enable an interactive learning environment via group discussions etc.[34]

Pertinently, the Court negated the plaintiff's contention that 'course of instruction' was confined to the time and place of instruction, and held that it would include anything that could be justified for the purpose of instruction. This, it held, would include steps commencing at a time prior to lecturing and continuing till after it. It also noted that apart from S.52(1)(a), which provides for the right to a "fair dealing" of any copyrightable work, other rights/purposes enumerated under S.52 would not have to meet the express requirement of fair dealing. Thus, S.52(1)(h) and S.52(1)(i) were recognised as affirmative purposes exempt from infringement. The fairness of use under these Sections can be deemed to be presumed by the legislature as long as it is justified by the purpose specified. Further, there are no quantitative restrictions on the extent of the reproduction.[35]

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[31] *The Chancellor, Masters & Scholars of the University of Oxford & Ors v Rameshwari Photocopy Services* ("DU Photocopy case") 2016 (68) PTC 386 (Del) [15] (Single Judge Bench). The Single Bench's position in this regard was affirmed by the Division Bench's decision as well.
[32] DU Photocopy case (Single Judge Bench) [41].
[33] DU Photocopy case 2016 (235) DLT 409 (Division Bench decision) [36].
[34] ibid.
[35] ibid [51].

Importantly, Supreme Court precedents were relied upon by the Division Bench to highlight that statutes must be interpreted as per societal realities.[36] Explanation (d) to S.32 of the Act defines the phrase 'purposes of teaching, research and scholarship' as '(i) purposes of instructional activity at all levels in educational institutions, including Schools, Colleges, Universities and tutorial institutions; and (ii) purposes of all other types of organized educational activity'. Thus, both the Single Judge Bench and the Division Bench held that, notwithstanding the difference in the wordings of Section 52(1) clauses (j) and (i), wherein clause (j) used the term 'educational institution', and clause (i) only used the terms 'teacher' and 'pupil', S.52(1)(i) would apply beyond individualised teacher-pupil interactions to encompass all organized educational activity by teachers, students or institutions.

Given the realities of the pandemic and the shift to organized online teaching, the geography and medium of instruction has changed. However, that does not curtail the expansive nature of permitted uses under S.52(1)(a), S.52(1)(h) and S.52(1)(i). Notably, the Single Bench decision mentioned that most students today scan pages from books that they are required to read, and read them on their electronic devices. The Court held that such uses are exempt from infringement.[37]

Section 52(1)(i)'s broad interpretation can potentially allow school libraries to distribute digitised versions of course packs, as well as other library collections to their students.[38]
The mandate for enabling access to, and distributing school textbooks as part of the state's obligations under the Right to Education would particularly be useful here to counter any claims of infringement and allow for easier access via freely available online downloads. Specifically, in light of the state's affirmative obligation to promote educational access that we shall flesh out in **Part 4**, it stands to reason that any arguments by the state to curtail the free download of educational content that it owns copyright over are unlikely to find purchase in a court.
Digitisation and distribution/sharing/lending of reading materials by libraries can also arguably constitute 'private or personal use, for research' under S.52(1)(a)(i). The Canadian Supreme Court in *Alberta (Education) v. Canadian Copyright Licensing Agency*[39], held that the notion

[36] ibid [11] relying on *S.P. Gupta v President of India* 1981 Supp SCC 87; *State of Maharashtra v Dr. Praful B. Desai* (2003) 4 SCC 601.
[37] DU Photocopy case (Single Judge Bench) [78].
[38] Divij Joshi, 'The Legality of Digital Libraries in a Lockdown', SpicyIP (29 April 29, 2020) <https://spicyip.com/2020/04/the-legality-of-digital-libraries-in-a-lockdown.html> accessed 1 February 2022.
[39] (2012) 2 SCR 345 [27].

of 'private study' should not be construed in a way that requires users to "*view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of classroom instruction rather than on the concept of studying, the Board again artificially separated the teachers' instruction from the students' studying*." This finding supports the argument that multiple users with copies (offline or online) of the copyrighted textbooks in question working together would still be said to engage in private study. This is because of the personal nature of the endeavour of studying and research. Further, in the case of *CCH Canadian v. Law Society of Upper Canada*, the Canadian Supreme Court had noted that the amount of material copied has to be assessed in light of the purpose of use.[40] It held that for purposes such as research and private study, copies of entire academic works may be required to be made.[41]

Alternatives available, the nature of the dealing (commercial or non-commercial) and adverse impact on the market for the materials are some contextual factors that determine fair dealing. The Division Bench in the *DU Photocopy* case observed that citizens with improved literacy, education and earning potential in the long run expand the market for copyrighted materials.[42] In light of this insight, and the lack of alternatives to access physical educational materials during a pandemic or because of distribution failures in ordinary circumstances, the fair dealing analysis should conclude in favour of permitting distribution of reading and learning materials online for educational purposes.

Currently, the Copyright Act is woefully inadequate in addressing concerns relating to the creation of digital libraries, even in emergency situations such as the pandemic. The 2012 Copyright Amendment Act added Section 52(1)(n), which allows a "non-commercial public library" to store a digital copy of works that it already owns a physical copy of for the purpose of preservation. While this enables the storing of a digital copy, it leaves open the question of whether or not that copy can be distributed or communicated.[43] Aside from issues of digital access,[44] making academic resources available to students via the internet, at least in the same

[40] 2004 SCC 13 [56].
[41] Id.
[42] DU Photocopy case (Division Bench decision) [36].
[43] Namratha Murugeshan 'CovEducation, Copyright and Fair Use in India' SpicyIP (17 April, 2020) <https://spicyip.com/2020/04/coveducation-and-copyright.html> accessed 1 February 2022.
[44] 'Learning Rebooted: Online Education During Covid-19 Lockdown Puts Spotlight on India's Digital Divide' News18 (03 April, 2020) <https://www.news18.com/news/india/learning-rebooted-online-education-during-covid-19-lockdown-puts-spotlight-on-indias-digital-divide-2563265.html> accessed 1 February 2022.

way that physical resources should have been available before the pandemic (library borrowing, copying, etc.) is crucial. For example, in an emergency, user rights could be strengthened to allow schools and universities to convert their library catalogues to digital repositories and share online course packs without awaiting permission and licenses from copyright owners. Digitising access can greatly benefit the visually impaired, as they can gain access to digital titles accessible with screen readers and participate more effectively in our knowledge economy.[45]

Uploading recorded videos of classes on platforms such as YouTube for asynchronous access to mitigate the impact of inequalities in access to the internet can also pose a host of issues under the Copyright Act. As per S.3 of the Copyright Act, 'publication' refers to making a work publicly available via copies or communication of the work to the public. Uploading recorded lectures on YouTube and other platforms for public access would fall under the definition of publication, and thereby be subject to S.52(1)(h) which constrains the use of copyrighted works in such publications to two short passages from the work. This is in stark contrast with S.52(1)(i) which does not limit the quantity of the material that can be reproduced.

Sharing materials primarily through WhatsApp and YouTube also entails a high level of dependence on private entities for the provision of an essential service, i.e. education. This makes education subject to the platform's policies, which may not be desirable even if it has emerged as the most convenient option. Even though platforms like YouTube provide Fair Use Protection,[46] anyone can file copyright take down notices. Taking permission from a copyright owner can be especially onerous and time consuming. Further, in March 2020, YouTube notified its regular creators that on account of greater reliance on automated systems instead of human reviewers for determining whether uploaded materials are infringing or not, "users and creators may see increased video removals, including some videos that may not violate policies."[47] Online interactions, communication and educational activity, regardless of whether they are commercial or not, can more often than not implicate interactions across physical distances that repurpose and reconstitute the raw materials of others' expressions. Digital environments, therefore present constantly evolving opportunities for educators and students. However, these robustly networked systems also have the capacity to monitor and restrict

[45] Murugeshan (n 43).
[46] YouTube 'Copyright' YouTube Creator Blog (16 Mar. 2020) <https://www.youtube.com/about/copyright/fair-use/#yt-copyright-protection> accessed 1 February 2022.
[47] YouTube 'Protecting our extended workforce and the community' YouTube Creator Blog (16 Mar. 2020) <https://blog.youtube/news-and-events/protecting-our-extended-workforce-and/> accessed 1 February 2022.

communication. In this regard, Bob Tarantino and Carys Craig note, "this is particularly pernicious when ostensibly infringing communications are prevented from occurring in the first place, such as when algorithmic filters cut off digital streams thereby denying them any audience at all."[48]

Lastly, even the commercial re-use of textbook materials in interesting online formats should be free and encouraged, because the use of audio-visual content in documentaries, podcasts, videos, movies etc. by independent creators can permit the publication of more creative educational works. This can take place even without significant financial capital, thereby increasing overall creativity, accessibility and welfare. This would be particularly helpful because many of the government's online learning initiatives have been met with a dismal response.[49]

The aforementioned analysis makes it clear that the user rights on education contained in Indian copyright law, when purposively interpreted, have significant potential to facilitate access to educational materials in new contexts. Equally, however, they are inadequate to meet the full range of challenges occasioned by the shift to digital learning that is currently underway. It is here that the RtE assumes significance. Specifically, when considered through the lens of the RtE, the richly articulated constitutional obligation of the State would make it imperative to ensure that copyright law does not operate as an impediment, particularly to the State's obligation to fulfil (by taking affirmative measures towards the realisation of the RtE) and respect (by ensuring that its own restrictive copyright policies around State Board textbooks do not hinder the enjoyment of the RtE). More on this is discussed in **Part 4** below.

III. Copyright Policies that Impede Access

The States/Union Territories of Andaman and Nicobar Islands, Arunachal Pradesh, Chandigarh, Jharkhand, Delhi, Goa, Haryana, Himachal Pradesh, Bihar, Jammu and Kashmir, Sikkim and Uttarakhand have adopted NCERT textbooks and syllabus.[50]

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[48] Carys J. Craig and Bob Tarantino "An Hundred Stories in Ten Days": COVID-19 Lessons for Culture, Learning and Copyright Law' (2020) Joint PIJIP/TLS Research Paper Series 62 <https://digitalcommons.wcl.american.edu/research/62> accessed 1 February 2022.

[49] See, for example, 'Odisha government's online learning initiative receives dismal response' The New Indian Express (25 June 2021) <https://www.newindianexpress.com/states/odisha/2021/jun/25/odisha-governments-online-learning-initiative-receives-dismal-response-2321230.html> accessed 1 February 2022.

[50] '12 states/UTs adopt NCERT textbooks, syllabus' The Economic Times (08 Sept. 2008) <https://economictimes.indiatimes.com/12-states/uts-adopt-ncert-textbooks-syllabus/articleshow/3460071.cms> accessed 1 February 2022.

NCERT has persistently faced criticism for being unable to fully satisfy the demand for its textbooks.[51] There have also frequently been questions raised in Parliament regarding the 'piracy' of NCERT textbooks.[52] In one of the replies to such questions, Shri M.A.A. Fatmi, former Minister of State in the Ministry of Human Resource Development noted that whenever a report of piracy is received by the NCERT, it is referred to the Economic Offence Wing in Delhi for suitable action, and that copyright of NCERT books is given to States that are desirous of using these books under the State syllabus.[53]

Making NCERT books available online for free under CC licenses would significantly curtail government expenditure in printing and distribution of these books. To be sure, this reduction of expenditure would only be of a limited character, given that online books cannot serve as perfect substitutes for physical ones. This is on account of the sharp digital divide in access to the internet in the country. Crucially, there are no judgments so far pertaining to the infringement of government copyright.[54] This is perhaps because enforcement of government copyright is not very strong. As the copyright policies of many state boards are not easily available online, we will focus here on the copyright policies of a few state boards which have been in the news for strict enforcement.

The copyright policies of some state governments restrict the very access that State Boards publishing textbooks were meant to facilitate. For instance, the copyright policy of the Maharashtra State Bureau of Textbook Production and Curriculum Research (Balbharati) prescribes licenses for limited use of its copyrighted material, while prohibiting authorized users (publishers, educational institutions, tutors etc.) from making audio/visual

[51] Anantrao Gudhe and Ram Jeevan Singh, Unstarred Question No: 1371, 'Availability of NCERT Text Books' Lok Sabha Number 13, Session IV (01 August 2000) <https://eparlib.nic.in/handle/123456789/464673> accessed 1 February 2022; Madan Lal Sharma, Unstarred Question No: 838, 'Short Supply of NCERT Books' Lok Sabha Number 14, Session XIII (04 March 2008) <https://eparlib.nic.in/handle/123456789/560375?view_type=search> accessed 1 February 2022; Sushil Kumar Singh, Supriya Sule and Ors., Unstarred Question No: 2869, 'Supply Of NCERT Books' (20 March 2017) <https://eparlib.nic.in/handle/123456789/697748?view_type=search> accessed 1 February 2022.

[52] Shivaji Mane, Question Number: 6656, 'Circulation of Pirated NCERT Books', Lok Sabha, Lok Sabha Number 13, Session III (09 May 2000) <https://eparlib.nic.in/handle/123456789/393177> accessed 1 February 2022; Laxminarayan Pandey, Chandramani Tripathi, Unstarred Question Number: 4517, 'Pirated Books of NCERT' (08 May 2007) Lok Sabha 14, Session X <https://eparlib.nic.in/handle/123456789/555592> accessed 1 February 2022.

[53] Laxminarayan Pandey, Chandramani Tripathi (n 52).

[54] Glover Wright, Pranesh Prakash, Sunil Abraham and Nishant Shah, 'Open Government Data Study: India' Centre for Internet and Society (20 May 2011) <https://cis-india.org/openness/blog-old/open-government-data-study> accessed 1 February 2022.

recordings of its content for production, distribution, sale or otherwise, unless specifically provided for in the Licensing Agreement.[55] [Section 2.1(vii), Balbharati Copyright Policy]

Further, as per the latest version of this policy, Balbharati decided to charge private publishers (new applicants), INR 17,700 for new registrations, while it is charging existing users INR 11,800 for renewal of registration, as opposed to the earlier registration fee of INR 1000. [Section 2.2(iv) and (v), Balbharati Copyright Policy]

This hike in registration fee pushed small publishers out of the market, particularly those who published regional language textbooks since Balbharati only publishes books in Marathi and English.[56] This had a detrimental impact on not just small-scale regional publishers but also students pursuing their junior college studies in other languages.[57]

Crucially, instead of taking a user rights-based approach, particularly to education, Section 3.4 of the Balbharati Policy prescribes additional responsibilities for teachers and students. This includes limiting photocopying and scanning to legitimate purposes by posting copyright notices near these machines.

Similarly, the Andhra Pradesh State Council of Educational Research and Training (APSCERT) provides prescribed textbooks on its website as e-books with a copyright notice that mentions that all APSCERT e-books for classes to I-XII can be downloaded for reference but their republication is "strictly prohibited."[58] It prohibits any person or agency from making an electronic or print copy of the books for redistribution in any form whatsoever.[59] It also urges readers to notify the State Council of any copyright infringement or commercial exploitation of the e-books.[60] The policy therefore, possibly forbids both commercial and non-commercial copyright infringing uses of the books, notwithstanding the greater access to and creation of content that such uses could facilitate. It provides that, "use of these books as part of digital content packages or digital content packages or software is also strictly prohibited."[61]

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[55] Balbharati Copyright Policy (updated 26 October 2020) <https://ebalbharati.in/copyright/pdfs/Revised_Policy_26_Oct_2020.pdf> accessed 1 February 2022.
[56] Kranti Vibhute, 'Small-scale publishers to suffer as Balbharati doubles registration charges' DNA India (22 October 2018) <https://www.dnaindia.com/mumbai/report-small-scale-publishers-to-suffer-as-balbharati-doubles-registration-charges-2677772> accessed 1 February 2022.
[57] ibid.
[58] 'Online eBooks Section' Andhra Pradesh State Council of Educational Research and Training <https://apscert.gov.in/ebookapp/ebook_page.jsp> accessed 1 February 2022.
[59] ibid.
[60] ibid.
[61] ibid.

Further, it notes that even hosting these online e-books on another website is prohibited unless links are provided after obtaining due written permission from the APSCERT.[62]

The existence of such overzealously protectionist policies has the potential to create deterrence and exert a chilling effect on the scope of citizens' user rights, creating structural hurdles to mass digitisation programmes, the systematic republication of the content in these books as well as the creation of new educational content using the material in these books. This can occur even if there has been little actual litigation in this regard.

It is important to note here that in light of the ambitiousness of the goal in making the government the owner of copyright over textbooks and the panoply of obligations under the RtE, the current proprietary models of publishing for educational materials are often overly restrictive. The specific educational exceptions in the Copyright Act are narrowly drawn and require a determination of fair dealing based on the unique circumstances of each case. The exceptions thus lend themselves to uncertainty which has the tendency of curtailing user rights, as users are unlikely to deploy these rights, in order to avoid liability. This risk aversion contributes to a clearance and permissions culture where notices and declarations to avoid doing certain acts such as photocopying, may constitute contractual waivers of some part of one's user rights.[63] This practice, as one of us has analysed before, is opposed to public policy.[64] Further, the fuzziness of the user rights can lead to negative externalities, chilling free speech and fair dealing, and ultimately constraining the scope of user rights as people increasingly waive them. This would make their use without permission less routine and eventually less fair, until it is not considered fair dealing at all due to a doctrinal creep[65] in the understanding of user rights altogether.[66] It is because of the vicissitudes surrounding the exercise of user rights on education that there is a need to locate the promotion of uninhibited access to educational content in the state's constitutional obligations under the RtE. It is only by identifying a constitutional home for the state's obligation on this count that we can create

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[62] ibid.

[63] James Gibson, 'Risk aversion and rights accretion in intellectual property law' (2006) 116 Yale LJ 5, 882 <https://digitalcommons.law.yale.edu/ylj/vol116/iss5/1/> accessed 1 February 2022.

[64] Anupriya Dhonchak, 'Can User Rights under Section 52 of the Indian Copyright Act Be Contractually Waived?' (2019) 13 NSLR 6 <https://nslr.in/wp-content/uploads/2019/05/NSLR-Vol-13-Issue-1-No-6.pdf> accessed 1 February 2022.

[65] Sara K. Stadler, 'Incentive and Expectation in Copyright' (2007) 58 Hastings Law Journal 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=889344> accessed 1 February 2022.

[66] See Anupriya Dhonchak, 'National Digital Library of India's (NDLI) Copyright Guide (Feedback) – Part II' SpicyIP (29 Sept. 2020) <https://spicyip.com/2020/09/national-digital-library-of-india-ndlis-copyright-guide-part-ii.html> accessed 1 February 2022.

a culture in which access to educational content owned by the state is given the importance that it deserves.

In contrast to the Balbharati Policy, the Karnataka Department of State Educational Research and Training's Karnataka Open Educational Resources initiative[67] makes its material available under the CC BY-SA 4.0 license. Though the website does not host many books, the books hosted are available in full unlike NCERT's National Repository of Open Educational Resources[68] wherein several chapters are missing from the books hosted online.[69]

The website of the Karnataka Textbook Society provides access to all books used by the Karnataka Secondary Education Board.[70] The Copyright Policy is also considerably more liberal than that of NCERT, since it allows the free reproduction of any material in any format without permission, while requiring attribution, accurate reproduction and prohibiting the usage of content in a misleading or derogatory way in case of re-use of the textbooks.

In the case of Assam, we could not find the e-books of all standards available for online download on any government website. An independent online repository, however, called Dev Library provided access to Assam Board textbooks in Assamese from Class 4 to Class 10.[71] We could not find any copyright policy in place for private publishers looking to create more educational content based on whatever material was used in the state board textbooks. The Copyright Policy on the website of the Assam State Textbook Production and Publication Corporation Ltd. provides that "material featured on this website may be reproduced free of charge after taking proper permission by sending a mail to us." Unlike the Karnataka Board and the Nagaland SCERT, in Assam, permission is required. Prior authorization from copyright holders is required by the Nagaland SCERT only when the material is explicitly identified as having been copyrighted by a third party.[72] However, the Nagaland SCERT website does not contain any textbooks or study materials.

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[67] Karnataka Open Educational Resources <https://karnatakaeducation.org.in/KOER/en/index.php/Main_Page> accessed 1 February 2022.
[68] National Repository of Open Educational Resources <https://nroer.gov.in/> accessed 1 February 2022.
[69] See Class 12 NCERT Accountancy book Accountancy Book < https://nroer.gov.in/55ab34ff81fccb4f1d806025/page/5e79961f16b51c5bd4ed59b1> accessed 1 February 2022; Class 12 NCERT Psychology Book < https://nroer.gov.in/home/file/5e79962816b51c5bd4ed59b9?selected=5e79031a16b51c232c3fbd55> accessed 1 February 2022.
[70] Karnataka Textbook Society <http://ktbs.kar.nic.in/> accessed 1 February 2022.
[71] Dev Library website <https://devlibrary.in/assam-class-4-environment-pdf-book/> accessed 1 February 2022.
[72] Nagaland SCERT Copyright Statement <https://scert.nagaland.gov.in/copyright-statement/> accessed 1 February 2022.

Similarly, the material on the Assam State Board website which can be produced freely does not contain the actual textbooks or e-books. Though the government has taken the decision to make textbooks available for free, the website of the Assam State Textbook Production and Publication Corporation Ltd. only provides the list of books prescribed.[73] The Assamese Government has put in place a Free Text Book (FTB) policy for the academic year 2021, which claims that it will be providing textbooks to 41,48,899 learners in Government/ Provincialised schools under the elementary cycle.[74] This was in fact initiated for the implementation of the RtE to ensure the printing and distribution of textbooks under the FTB scheme. In Madhya Pradesh too, we could not find the copyright policy of state board textbooks. However, in February 2020, there was a move to ensure that government aided and private schools affiliated to the MP Board must not use books by private publishers. This was done with the laudable objective of ensuring that schools do not force parents to buy books by private publishers, which are often considerably more expensive than NCERT books.[75] However, mandating only NCERT books from pre-primary to Class 12, to the absolute exclusion of books by private publishers revealed many problems. Many private school owners complained about NCERT books not being adequately available and timely updated.[76] This restricts the ability of students to receive the latest information on the subjects that they are studying, which would be detrimental, particularly for students preparing for competitive examinations.[77] This also offers arguments in favour of a competitive market of private publishers who can freely use content from the NCERT/state board textbooks to create their own learning materials.

IV. Constitutional Mandate Imposed on the State by the RtE:

The preceding analysis demonstrates that the copyright policies of several state governments can inhibit meaningful educational access. While it is not our contention that such policies and restrictive licensing conditions are the only, or even primary, reason for insufficient access to education in general and textbooks in particular, we submit that the above analysis evidences

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[73] Assam SCERT List of Textbooks <https://scert.assam.gov.in/portlets/list-of-textbooks> accessed 1 February 2022.

[74] Governor's Speech, Assam Assembly Parliamentary Session (February 2021) <http://assamassembly.gov.in/governorspeech-eng-febsession-21.pdf> accessed 1 February 2022.

[75] 'Non-NCERT books in CBSE schools ruffle feathers' The Times of India (10 February 2020) <https://timesofindia.indiatimes.com/city/bhopal/non-ncert-books-in-cbse-schools-ruffle-feathers/articleshow/74050988.cms>.

[76] Laveena Francis 'MP Board bans private publishers' books, school owners concerned about availability of NCERT ones' The Times of India (27 February 2020) <https://timesofindia.indiatimes.com/city/indore/mp-board-bans-private-publishers-books-school-owners-concerned-about-availability-of-ncert ones/articleshow/74344157.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst&pcode=461> accessed 1 February 2022.

[77] ibid.

that they are a contributor to the lack of such access. In this section, therefore, we will consider how this problematic state of affairs can be mitigated by using the RtE. Before delving into a discussion on the contours of the RtE, a threshold question must be answered. Why is the RtE the most apposite remedy for the ills of the restrictive copyright policies discussed in the previous part? More broadly, what makes the use of a rights-based framework the appropriate solution in this case?

There are at least three possible answers to this question. First, as the discussion below will show, the RtE [as an unenumerated and explicit right] has been formulated by the Supreme Court in broad and categorical terms. While the precise contours of the right have admittedly not been clearly delineated, it is clear that the right enjoys a high level of relative importance vis-a-vis other fundamental rights. Further, it is the only fundamental right to have been explicitly couched as an affirmative obligation on the state, as the Supreme Court's holding in Anuradha Bhasin, discussed below, makes clear. Consequently, framing the issue of restrictive copyright policies as implicating the RtE will trigger the full panoply of state obligations encompassed within the right. It will also require any justification for restricting the right to pass constitutional muster.[78]

Second, a body of scholarly opinion suggests that the educational exceptions within Indian copyright law are restrictive and not sufficiently broad to facilitate the dissemination of copyrighted content in the digital world. Illustratively, Lawrence Liang analyses the four educational exceptions within Indian copyright law. He finds that each of these exceptions is deficient from the standpoint of facilitating distance learning and access to educational content in new and innovative ways. Therefore, he proposes the insertion of new exceptions that can facilitate the uninhibited dissemination of copyrighted content in the digital world.[79] Similarly, Sebastian notes that the exceptions contained in Indian copyright law are not sufficiently robust to keep pace with technological developments.[80] In the same vein, Namratha Murugeshan

[78] For a somewhat similar argument in the context of the right to privacy, see Vrinda Bhandari and Karan Lahiri, 'The Surveillance State: Privacy and Criminal Investigation in India: Possible Futures in a Post-Puttaswamy World' (2020) 3(2) Univ. of Oxford Human Rights Hub Journal 15 at 29 arguing, "after Puttaswamy, there is a clearer sense of the impact of surveillance on privacy. After all, a richer articulation of the right to privacy heightens the quality of justification required for its interference."

[79] Lawrence Liang, 'Exceptions and Limitations in Indian Copyright Law for Education: An Assessment' *3*(2) The Law and Development Review at 27. Shiyana Sebastian, 'Right to Education and Fair Use under Copyright Law in India' Direitos Fundamentais, Tecnologia E Educacao at 257, 263; Also see Narayan Prasad and Pravesh Aggarwal, 'Facilitating educational needs in Digital Era: Adequacy of Fair Dealing provisions of Indian Copyright Act in question' (2015) 18 The Journal of World Intellectual Property, 3-4 at 157.

points out that the legal position as to the permissibility of making video recordings of educational content is unclear. This is because none of the fair dealing exceptions in the Copyright Act deal with the same. Creators of such videos might therefore be forced to modulate their videos to ensure that their use is not legally suspect. The extent to which digital copies of educational content can be distributed or communicated is also unclear.[81] In a representation made to the Registrar of Copyrights, a group of IP professors, called the 'Like-Minded IP Teachers' Working Group on Intellectual Property and Public Interest' has proposed that the Copyright Act needs to be amended in the following 5 areas, in order to meet the educational needs of today:

a. Teaching, learning and examination in all medium including distance learning
b. Preparation and distribution of course materials
c. Performance or communication of the works for educational purposes
d. Online storing of works for educational use
e. Circumventing technological protection measures if necessary to enable educational use.[82]

These views are in line with the analysis on user rights on education conducted in the two preceding parts of this paper. To recap, we had concluded that these user rights are fuzzy and indeterminate, that their deployment in the digital context is a challenging enterprise and that their evolution is contingent on case-by-case adjudication. Therefore, the RtE can serve as a robust legal basis for the widespread dissemination of, and access to, educational content, the copyright over which is governmentally-owned. More concretely, using the obligations imposed upon the state under the RtE, it can be contended that there is a need for the above modulations to the Copyright Act, to ensure the meaningful vindication of the RtE.

Finally, even if existing user rights under copyright law that are exempt from infringement can be used to ensure the modulation of state copyright policies, there is nonetheless value to be derived from relying on the RtE. Specifically, as one of us has previously argued, by viewing copyright exceptions as user rights, we can more clearly establish their linkage with the Constitutional goals, especially those embodied in the fundamental rights chapter, that they

[81] Murugeshan (n 43)
[82] Like-Minded IP Teachers' Working Group of on IP and Public Interest - [Copyright Amendment 2020-21] - List of recommendations - Google Docs <https://docs.google.com/document/d/1fYBArzpmHCGCYjStU55xNgSpMBpSrMhDvTYmn8Yq7gE/edit#heading=h.cwwx6pvsfetg> accessed 1 February 2022.

seek to promote.[83] This ensures that such rights cannot be contractually waived and also serves to impose an affirmative obligation on copyright owners to ensure the realization of these rights.[84] In support of this argument, a parallel can be drawn with the argument made by Gautam Bhatia in the context of the relationship between free speech and copyright.

Specifically, Bhatia argues that, under Article 19(1)(a) of the Constitution, the Government is not merely prohibited from censoring speech. Rather, he contends that "inequalities of resources acting as barriers to free expression, even though not directly caused by affirmative State action, nonetheless constitute an impediment to the full exercise of the 19(1)(a) right, since they are upheld by State legislation governing property, transfers of goods and, in this case, copyright."[85] On this basis, he contends that unaffordable textbook pricing should be considered a barrier to the enjoyment of Article 19(1)(a) and copyright law should be interpreted in a manner that supports the enjoyment of the fundamental right to free speech.[86] This example shows how couching an issue of copyright law in rights-based terms can have positive substantive and symbolic consequences.

The utility of deploying a rights-based framework having now been established, we will turn to a discussion of the contours of the RtE. The story of how the RtE came to acquire a secure constitutional home in Part III of the Indian Constitution is familiar. At the time of the founding of India's Constitutional democracy in 1950, the constitutional obligation on the state as regards the RtE was contained in part 4, delineating the Directive Principles of State Policy. Article 45 stated as follows: "the State *shall endeavour to provide* free and compulsory education for all children under 14 within 10 years." As Fredman notes, the faith that this article reposed in the political process for ensuring free and compulsory education proved 'too optimistic'.[87]

Since this commitment was not fulfilled more than 4 decades after the Constitution came into force, the Supreme Court felt compelled to intervene. It read the RtE as being an implied right under Article 21 of the Constitution in two cases. In the first case, in 1992, *Mohini Jain v. State*

[83] Dhonchak (n 64) at 123; Pascale Chapdelaine, *Copyright User Rights* (OUP 2017) 48.
[84] ibid.
[85] Gautam Bhatia, 'Copyright and Free Speech – I' Indian Constitutional Law and Philosophy (7 Oct 2013) <https://indconlawphil.wordpress.com/2013/10/07/copyright-and-free-speech-i-constitutional-arguments-againstoup-et-al-in-the-delhi-university-photocopying-lawsuit/> accessed 1 February 2022.
[86] Gautam Bhatia, 'Copyright and Free Speech – II' Indian Constitutional Law and Philosophy (7 Oct 2013) <https://indconlawphil.wordpress.com/2013/10/07/copyright-and-free-speech-ii-constitutional-arguments-against-oup-et-al-in-the-du-photocopying-case/> accessed 1 February 2022.
[87] Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 358.

of Karnataka and Ors.[88], the Karnataka Government, by enacting a legislation, imposed capitation fees for securing admission in private medical colleges. Through a notification, the Government fixed Rs. 2000/- per year as tuition fee payable by candidates admitted against 'government seats'. Other students had to pay Rs 25,000 per annum and those outside the state Rs. 60,000 per annum. The petitioner, who hailed from Meerut, was asked to pay the capitation fees applicable for non-state residents. When her father informed the college management that he was unable to pay the same, she was denied admission. This was challenged by her through an Article 32 petition. The Court, speaking through Justice Kuldeep Singh, held as follows:

"We hold that every citizen has a 'right to education' under the Constitution. The State is under an obligation to establish educational institutions to enable citizens to enjoy the said right. The State may discharge its obligation through State-owned or State-recognised educational institutions."[89]

Further, the Court viewed the RtE as being intrinsic to an individual's dignity as well as a multiplier right – a right that facilitates the enjoyment of other rights.[90] It expounded on the importance of education in the following terms: "It is primarily [sic] the education which brings forth the dignity of a man . . . An individual cannot be assured of human dignity unless his personality is developed and the only way to do that is to educate him."

The categorical enunciation of the RtE was subsequently qualified in the case of *Unni Krishnan, J.P. v. State of Andhra Pradesh*[91] in which it was held that the state's obligation to provide free education only applies to children up to the age of 14. Thereafter, the obligation of the state would be contingent on the availability of capacity.[92] In 1995, the SC reiterated in *State of HP v. HP State Recognised High Schools Managing Committee*[93] that lack of economic or financial capacity cannot be cited as an excuse for denial of access to education to children under the age of 14.

The ratio of these judicial pronouncements was explicitly enumerated in the Constitution, through the 86th Amendment to the Constitution. The Amendment added Article 21A to the Constitution which reads as follows:

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[88] (1992) 3 SCC 666.
[89] ibid [17].
[90] Fredman (n 87) 358.
[91] AIR [1993] SC 2178.
[92] See M P Jain, 'Indian Constitutional Law' Chapter XXVII-A (7th Edition).
[93] (1995) 4 SCC 507.

"21A. The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

This Constitutional obligation has found statutory manifestation through the enactment of the RtE Act, 2009. The SC has upheld the Constitutionality of the law, while making it inapplicable to unaided minority institutions.[94] The obligations imposed on the state to secure the enjoyment of this right can be culled out from the jurisprudence of the SC on the interpretation of Article 21A. Illustratively, in *Avinash Mehrotra v. Union of India*[95], the SC, speaking through Justice Dalveer Bhandari, described the RtE as being much more than a fundamental or human right. It held that the right "places an affirmative burden on all participants in our civil society [for its realization]."[96] It emphasized that the RtE ensures compulsory education for children in the relevant age group, in a manner that is not dependent on cost and government action.[97]

In *Ashoka Kumar Thakur v. Union of India and Ors.*[98], the SC described the RtE as being 'the most important fundamental right'. Emphasizing the role of the right as a multiplier right [as Mohini Jain had done], the Court noted that the central importance of the RtE is the reason why the Court must supervise government spending on free and compulsory education.[99]

The SC has also recognized that the RtE is unique amongst all Part III rights in that it imposes positive obligations on the state to secure its realization. In Anuradha Bhasin v. Union of India and Ors.[100], the SC held that the fundamental rights in Part III of the Constitution are negatively worded. However, the RtE is: "a positive right that requires an active effort by the concerned government to ensure that the right to education is provided to all children up to the age of 16 [sic 14] years."[101] In a recent judgment, the Supreme Court held that the State has an affirmative obligation to facilitate access to education, at all levels.[102]

In a recent order dated 8th October 2021, the SC dealt with a plea by the managements of unaided recognized schools in Delhi that they should not be made to bear the cost of providing

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[94] See *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 1 (Majority opinion); Aishwarya Ayushmaan & Deepthi Bavirisetty, 'Right to Education: Edging Closer to Realisation or Furthering Judicial Conundrum?' (2014) Nat'l L. Sch. India Rev. 26; Arjun Jayadev and Sudhir Krishnaswamy, 'Healthcare Law in the US and the RTE In India: Steps Towards Universal Provision of Social Goods' (2012) Economic and Political Weekly 31-36.
[95] (2009) 6 SCC 398.
[96] ibid [29].
[97] ibid.
[98] (2008) 6 SCC 1.
[99] ibid [466].
[100] (2020) 3 SCC 637.
[101] ibid [20].
[102] *Farzana Batool v Union of India and Ors.*, CWP No. 364 of 2021 [9].

equipment as well as internet package to students from economically weaker sections and thereafter seek reimbursement from the state, owing to the shift to online learning occasioned by the COVID-19 pandemic. The state pushed back, arguing that it did not have the requisite resources to directly purchase the equipment and resources. The SC noted that, due to existing stark inequalities in our societies, students from, children belonging to economically weaker sections/ disadvantaged groups may not be able to fully pursue their education. It held: "The State cannot wash its hands of the obligation imposed particularly by Article 21 A of the Constitution." It emphasized that Article 21A of the Constitution has to become a reality and therefore the "needs of children from the underprivileged sections to receive adequate access to online education cannot be denied."[103]

Further, the SC has also stressed on the importance of the state ensuring that it provides quality education in the discharge of its constitutional obligation. In *State of Bihar and Ors. v. The Bihar Secondary Teachers Struggle Committee, Munger and Ors*.[104], it was held that the interpretation placed on the right must be one that helps make its realization a reality. The provision's child-centric character and the importance of quality must be kept in mind.[105] In *State of Tamil Nadu and Ors. v. K. Shyam Sunder and Ors.*[106] the SC held: "The right of a child should not be restricted only to free and compulsory education but should be extended to have quality education without any discrimination on economic, social and cultural grounds."[107]

Despite the articulation of this mandate of the State, Indian courts are yet to offer a clear framework for determining the precise contours of these broad and amorphous obligations. Here, the guidance articulated by the Committee on the Covenant on Economic, Social and Cultural Rights [CESCR Committee] would be helpful. India is a signatory to the International Covenant on Economic, Social and Cultural Rights [ICESCR]. Article 13 of the Covenant outlines the contours of the RtE and the obligation of the state to secure its realization.

General Comment 13 of the CESCR Committee outlines the specific contours of the RtE. In a recent judgment, the SC held that this Comment is of persuasive value in Indian Courts. [108] The Committee held [in General Comment 13] that the RtE, like all human rights, imposes

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[103] *Action Committee Unaided Recognised Private Schools v. Justice For All,* SLP(C) No. 4351/2021 [4].
[104] (2019) 18 SCC 301.
[105] ibid [78].
[106] (2011) 8 SCC 737.
[107] ibid [7].
[108] Farzana Batool (n 103) [11].

three sets of obligations on the state. These are the obligations to respect, protect and fulfil. Under the obligation to respect, state parties cannot hinder or prevent the enjoyment of the RtE. Under the obligation to protect, a state is required to take measures that prevent third parties from interfering with the enjoyment of the RtE. The obligation to fulfil has two components. First, states are required to take positive measures to facilitate the enjoyment of the RtE by individuals and communities. Second, states are required to take measures to assist in the enjoyment of the right by those who would otherwise not be able to enjoy the right.[109] The General Comment also requires the state to ensure that education at all levels exhibits four critical features. It must be available, accessible, acceptable and adaptable. [110]

V. Justiciability

Now that the contents of the RtE have been outlined in the above segment, and it has been shown why a rights-based solution to this problem would be appropriate, the question that arises is this. How can the RtE be used as a prompt to ensure the suitable modulation of state copyright policies?

Given that there exist multiple possible avenues for reform, which one should be pursued and why? In this segment, we propose a court-mediated solution to pursue copyright law reform. This is because the need for such reforms is grounded in the RtE, as the absence of such reforms has the consequence of preventing the effective enjoyment of the RtE as regards educational content whose use under existing copyright law is legally suspect. Differently stated, the state's failure to effectuate such reforms will result in the continued deprivation of the RtE. There is no gainsaying the fact that, in cases evidencing a clear deprivation of Constitutional rights, a court has the mandate to intervene. [111] This, of course, does not preclude the possibility of copyright law reform being pursued through other means, such as legislative amendments. Indeed, the court-mediated process we propose will only facilitate a bounded dialogue that can help usher in the necessary reforms, irrespective of the avenue through which such reforms take place.

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[109] General Comment 13, CESCR Committee [47].
[110] ibid [6].
[111] See Meera Emmanuel, 'Supreme Court has a mandate to interfere in cases evidencing deprivation of Constitutional rights: Justice DY Chandrachud' (Bar and Bench, 26 Nov, 2020) <https://www.barandbench.com/news/constitution-does-not-belong-solely-to-lawyers-judges-justice-dy-chandrachud> accessed 1 Feb 2022.

The next question that arises is this. Given that the RtE is a right whose enjoyment entails complex questions of resource allocation and priority setting, how can a court, given its institutional constraints, ensure the meaningful operationalization of the right? One possible answer to this conundrum would be the adoption of a dialogic model. Under this approach, the court would enter into a dialogue with the relevant organ of the government, so as to encourage them to adopt a solution that vindicates the right at issue. In cases involving socioeconomic rights, Indian courts have adopted dialogic solutions in the past. Illustratively, the SC entered into a dialogue with the government to ensure implementation of existing food schemes, in the celebrated right to food case.[112] Some High Courts also resorted to this approach in ensuring a more robust governmental response to the challenges posed by COVID-19.[113] In a recent judgment concerning the interpretation of a set of provisions in the Insolvency and Bankruptcy Code, the SC endorsed the value of a dialogic approach in the following terms: "It is through the instrumentality of an inter-institutional dialogue that the doctrine of separation of powers can be operationalized in a nuanced fashion. It is in this way that the Court can tread the middle path between abdication and usurpation."[114]

However, the key drawback of the dialogic approach is that it does not offer a framework within which the dialogue must take place – the bounds within which it must be conducted and the goals it should seek to secure.[115] It is here that Sandra Fredman's bounded deliberative approach becomes useful. She recognizes that a court cannot compel the government to opt for the court's chosen policy preferences. However, it can require the government to justify why particular preferences have been made in light of other competing principles and exact accountability.[116] More importantly, the dialogue is bounded by the human rights at stake. The approach accommodates the possibility of reasonable disagreement between the court and the government, as long as the human rights at issue are appropriately vindicated.[117]

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[112] PUCL v Union of India WP (C) No. 196/2001 (Indian SC)

[113] Gautam Bhatia, 'Coronavirus and the Constitution –XXVIII: Dialogic Judicial Review in the Gujarat and Karnataka High Courts' Indian Constitutional Law and Philosophy (24 May 2020) <https://indconlawphil.wordpress.com/2020/05/24/coronavirus-and-the-constitution-xxviii-dialogic-judicial-review-in-the-gujarat-and-karnataka-high-courts/> accessed 1 February 2022; Aakanksha Saxena, 'Coronavirus and the Constitution –XXXIII: N-95 Masks and the Bombay High Court's Dialogic Judicial Review [Guest Post]' Indian Constitutional Law and Philosophy (28 June 2020) <https://indconlawphil.wordpress.com/2020/06/28/coronavirus-and-the-constitution-xxxiii-n-95-masks-and-the-bombay-high-courts-dialogic-judicial-review-guest-post/> accessed 1 February 2022.

[114] *Gujarat Urja Vikas Nugam Limited v Amit Gupta*, 2021 SCC OnLine SC 194 [170].

[115] Fredman (n 87) 66.

[116] Fredman (n 87) 91.

[117] Fredman (n 87) 92.

Drawing on this approach, the Court can set the contours of the RtE, as described above, as the bounds of the dialogue. It can supplement this analysis with an articulation of possible changes that the government can make to its copyright policies, to ensure that it is in conformity with the RtE. It can indicate to the government that the issuance of Creative Commons Licenses, for instance, appears to be an efficacious solution. It can also suggest other measures to the government, such as relaxing copyright licensing standards, amending the Copyright Act to bring in exceptions that suitably facilitate digital education and innovative learning or amendments to the RtE Act, to ensure that copyright law should not come in the way of the effective enjoyment of the RtE.

Given a Court's institutional limitations, it cannot conclusively determine what reforms should be pursued to ensure the vindication of the RtE. Equally, given that the need for the attenuation of the copyright barrier is directly traceable to the government's obligation to respect the RtE, the Court can ensure that the government devises and implements ways and means of ensuring the robust enjoyment of the RtE. To this end, the Court can reject any proposals that it feels do not attain this objective.[118]

In the *suo motu* proceedings initiated by the Supreme Court in light of the consequences flowing from the second wave of the pandemic, the Court used the bounded deliberative approach as the structuring framework for its analysis. It held that it was deploying this approach so that the Union and state governments could offer the rationale for their policy choices. It held that the dialogue would be bounded by the right to equality and the right to life.[119] It pertinently held in its order issued on 31st May[120], that the Central Government's decision to substitute the policy of directly providing free vaccination to eligible citizens under the first two phases, with a decision to outsource the procurement and distribution of vaccines to state governments under the third phase was *prima facie* irrational and arbitrary. [121] It had also expressed doubts as to the Constitutionality of the Centre's decision to decentralize the task of procuring vaccines to the states and had noted that this could "place severe burdens, particularly on States/UTs suffering from financial distress."[122]

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[118] Rahul Bajaj, 'Towards Using the Right to health to prevent Constitutionally Intolerable Denial of Access to Patented Drugs' MPhil in Law Thesis (2020) <https://spicyip.com/wp-content/uploads/2021/08/Bajaj-MPhil-in-Law-Thesis.pdf> accessed 1 February 2022.
[119] In Re: Distribution of Essential Supplies and Services during Pandemic, Suo Motu Writ Petition (Civil) No.3 of 2021, order dated 30.4.2021 [5].
[120] ibid, order dated 31.5.2021 [2].
[121] ibid [20].
[122] ibid [30] - [31].

Soon after this order, the Centre decided to centralize the procurement of vaccines and to make them available to all individuals above the age of 18, free of charge. As Gautam Bhatia notes, it is impossible to precisely quantify the extent to which this policy shift was prompted by the Supreme Court's orders. However, it is clear that the Court's three orders of 27th April, 30th April and 31st May played a significant role and "vindicate the Court's bounded-dialogic approach towards the exercise of judicial review over the management of the pandemic."[123] This example powerfully demonstrates the utility of the bounded deliberative model to nudge the executive into acting in a constitutionally compliant fashion.

Further, the landmark Delhi High Court judgment in the *DU photocopy case* represents an excellent example of the way the RtE can be used by a court as a prompt to push for the reorientation of copyright law. As Emmanuel Oke notes, while the Court did not explicitly invoke the right to education, it emphasized the importance of education in the following terms: "education is the foundation on which a progressive and prosperous society can be built."[124] It stated that there is a need to promote "equitable access to knowledge to all segments of the society, irrespective of their caste, creed and financial position," with: "the more indigent the learner, the greater the responsibility to ensure equitable access." [125] As Oke points out, the Court's approach is "consistent with the incorporation of a right-to-education perspective into the interpretation of copyright law."[126] This, he explains, is because the government is obligated to respect the RtE by ensuring that teachers and students are able to freely make copies of educational content, without any arbitrary restrictions, as long as it is fit for an educational purpose.[127] Ruth Okediji similarly notes with reference to the *DU photocopy case* that, while not explicitly referencing the RtE, "an Indian Court interpreted the Indian Copyright Act in a manner that arguably implements the right to education and the right to participate in cultural life."[128]

In the same vein, students who are unable to access copyrighted content owing to restrictive copyright policies or inappropriately framed educational exceptions can use the RtE to argue

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[123] Gautam Bhatia, 'Coronavirus and the Constitution – XXXVII: Dialogic Review and the Supreme Court (2)' Indian Constitutional Law and Philosophy (3 June 2021) <https://indconlawphil.wordpress.com/2021/06/03/coronavirus-and-the-constitution-xxxvii-dialogic-review-and-the-supreme-court-2/> accessed 1 February 2022.
[124] DU Photocopy case (Division Bench judgment) (n 33) [30].
[125] ibid.
[126] Emmanuel Oke, 'The right-to-education responsibilities of book publishing companies' (2018) Indian Journal of Law and Technology 14.
[127] ibid.
[128] Ruth L. Okediji, 'Does intellectual property need human rights' (2018) 51 NYUJ Int'l L. & Pol. at 54.

that the status quo violates the government's obligation to respect the RtE. The Court can use the RtE and the state's obligations flowing from it as the basis to ask the government to relax its copyright policies and modify existing fair dealing exceptions. Given that all statutes must be compliant with fundamental rights, it can also return a prima facie finding that the fair dealing educational exceptions at present appear inconsistent with the Supreme Court's understanding of the RtE and therefore merit revisitation.

VI. Conclusion

Justice Endlaw in the *DU Photocopy Case*, cited an article[129] to emphasise the similarity of free speech and copyright goals by noting that copyright is meant to foster and not restrict the "*harvest of knowledge, motivate the creative activity of authors and inventors in order to benefit the public.*"[130] This reasoning evidently highlights that the goal of copyright is served insofar as compensation to creators operates as a means for greater public welfare. The exercise of user rights under Section 52 of the Copyright Act serves an important social purpose. Users are entitled to exercise these rights to the extent justified by their stated purpose.[131] User rights were given an extensive interpretation in this case by relying on the German Federal SC in *Re. the Supply of Photocopies of Newspaper Articles by Public Library*[132] to bolster the conclusion that "*the freedom to operate and the reproduction rights of authors were restricted in favour of freedom of information.*" Justice Endlaw noted in this regard that no extraneous limitations could be read into Section 52 by Courts inquiring into whether the rights of the authors were unreasonably prejudiced since the legislature would be presumed to have already determined otherwise by enacting Section 52 and the purposes mentioned therein.

With the shift of at least some educational activities online, copyright claims may need to be restricted in a manner that they do not curtail the very activities that justify the existence of copyright, and which copyright law is ostensibly intended to enable.[133] A purposive approach to substantive technological neutrality entails interrogating the application of the law in a

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[129] Shamnad Basheer, Debanshu Khettry et al. 'Exhausting Copyrights and Promoting Access to Education: An Empirical Take' (2012) 17 Journal of Intellectual Property Rights <http://nopr.niscair.res.in/bitstream/123456789/14461/1/JIPR%2017(4)%20335-347.pdf> accessed 1 February 2022.
[130] DU Photocopy case (Single Judge Bench) (n 31) [80].
[131] DU Photocopy case (Single Judge Bench) (n 31).
[132] (2000) ECC 237.
[133] Carys J. Craig, 'Technological Neutrality: Recalibrating Copyright in the Information Age' (2016) 17 Theor. Inq. L. 601.

fashion that is in pursuance with the normative objectives and foundational justifications for copyright law in the face of technological changes.[134]

Therefore, if the principal aim of copyright, particularly in the context of government copyright in textbooks, is to maximise the public dissemination of these works in light of the obligations under the RtE, then reduced opportunities for physical access and distribution must be compensated for by increasing avenues for digital distribution. The Supreme Court of Canada, for instance, underscored the importance of substantive technological neutrality in the case of *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.* while noting that "the traditional balance between authors and users should be preserved in the digital environment."[135]

The current realities of access to educational material in India, restrictive copyright policies of various state boards and the host of state obligations under the RtE reveal a need to reconsider traditional proprietary models of publishing that inhibit students, teachers, other content creators and publishers from accessing, sharing and creating learning materials. There is a need to make the content of textbooks published by government boards available under Open Access models.

Currently, there is no consistency in copyright policies across State Boards. The Boards as owners of 'government works' under Sections 2(k) and 17(dd) of the Copyright Act should conduct a survey of all their works to establish costs of production and revenue.[136] Then keeping their public function in mind, they should ascertain the creative commons license under which they can make their works available. CC licenses can make these books available to the public, particularly as e-books on the internet, permitting the re-use and modification of these works for both non-commercial as well as commercial purposes. The CC licensing suite can ensure integrity of educational materials by requiring re-users to ensure attribution and clarify noticeably that their work constitutes a modified version of the licensor's work.

By entering into a bounded dialogue with the government, consistent with the framework outlined above, the Court can play a constructive role in making the copyright policies of state governments more conducive for greater educational access. In this way, it can be ensured that governmental ownership of copyright over educational content serves the public interest that was the raison d'etre for vesting the government with these rights in the first place.

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[134] Craig and Tarantino (n 48).
[135] 2015 S.C.R. 57 (Can.) [147] - [148].
[136] Rakhecha (n 4) 26.