

COPYRIGHT ISSUES FOR DIGITAL LIBRARIES : AN INDIAN CONTEXT

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ABSTRACT

Library and information services are gateways to knowledge and culture. As libraries move into the digital age, they increasingly face copyright and other intellectual property questions. Creating digital surrogates and using digital technologies to make copyrighted works available to the public raise many issues. Libraries are not just shelves of books or collections of databases, but present scenario demands to support copyright because we recognise the need for creators to be rewarded for their work and for creative works to be protected from piracy and other unfair exploitation. The purpose of this study is to analyze copyright and related rights issues involved in the digital preservation and dissemination in Indian context.

Keywords: *Indian Copyright Act, Library & Copyright, Digital Millennium Copyright Act, Copyright Barriers, Copyright Exceptions.*

1. INTRODUCTION:

Most informational resources that make up university library collections are copyrighted works, meaning that a good proportion of the everyday activity of these libraries comes into contact with copyright law. We can find a wide array of examples. If one copies, photocopies, scans, or digitizes a work, the right of reproduction must be taken into account, as it does when something is downloaded from the Internet. Making a work available to the public, whether over Internet or in an intranet, has implications for the right of communication to the public. If a work is adapted, translated, or summarized, we run into the right of transformation. Moreover, the moral rights of the authors, which were rarely an issue when dealing with analog information, are strongly affected in the case of digital information.¹ Thus, modifying or eliminating the authorship data of a work is an infraction of the right of paternity/attribution, while significantly altering a work, for instance through activities of digital preservation, may entail an infraction of the right of integrity. Problems can also arise surrounding some norms recently included in most national copyright laws.

2. INDIAN COPYRIGHT ACT, 1957

2.1 Meaning of Copyright.— For the purposes of this Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in

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¹The Role of Libraries in Education, Prof. Dr. K.M. Saiful Islam <http://www.infosciencetoday.org/educa.htm>

respect of a work or any substantial part thereof, namely:-

- (a) in the case of a literary, dramatic or musical work, not being a computer programme,-
 - (i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
 - (ii) to issue copies of the work to the public not being copies already in circulation;
 - (iii) to perform the work in public, or communicate it to the public;
 - (iv) to make any cinematograph film or sound recording in respect of the work;
 - (v) to make any translation of the work; (vi) to make any adaptation of the work;
 - (vi) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme,-

- (i) to do any of the acts specified in clause (a);
- (ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme: Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

(c) in the case of an artistic work,-

- [(i) to reproduce the work in any material form including-
 - (A) the storing of it in any medium by electronic or other means; or
 - (B) depiction in three-dimensions of a two-dimensional work; or
 - (C) depiction in two-dimensions of a three-dimensional work;]
 - (ii) to communicate the work to the public;
 - (iii) to issue copies of the work to the public not being copies already in circulation;
 - (iv) to include the work in any cinematograph film;
 - (v) to make any adaptation of the work;
 - (vi) to do in relation to adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

(d) in the case of a cinematograph film,-

- [(i) to make a copy of the film, including-
 - (A) a photograph of any image forming part thereof; or
 - (B) storing of it in any medium by electronic or other means;]
 - [(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the film;]
 - (iii) to communicate the film to the public;

(e) in the case of a sound recording,-

- (I) to make any other sound recording embodying it [including storing of it in any medium by electronic or other means];
- [(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording;]
- (iii) to communicate the sound recording to the public

²*The Indian Copyright Act, 1957, Section 14*

³Subs. by Act 49 of 1999, s. 3, for sub-clause (w.e.f. 15-1-2000)

2.2 Works in which Copyright Subsists:

(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,— (a) original literary, dramatic, musical and artistic works; (b) cinematograph films; and (c) 1 [sound recording]. (2) Copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of section 40 or section 41 apply, unless,— (i) in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India; (ii) in the case of an unpublished work other than a 2 [work of architecture], the author is at the date of the making of the work a citizen of India or domiciled in India; and (iii) in the case of 2 [work of architecture], the work is located in India.

2.3 Explanation:

In the case of a work of joint authorship, the conditions conferring copyright specified in this sub-section shall be satisfied by all the authors of the work. (3) Copyright shall not subsist— (a) in any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work; (b) in any 1 [sound recording] made in respect of a literary, dramatic or musical work, if in making the 1 [sound recording], copyright in such work has been infringed. (4) The copyright in a cinematograph film or a 1 [sound recording] shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or, as the case may be, the 1 [sound recording] is made. (5) In the case of 2 [work of architecture], copyright shall subsist only in the artistic character and design and shall not extend to processes or methods of construction.

3. LIBRARIES AND COPYRIGHT

So where do libraries stand on copyright? Libraries support copyright because we recognise the need for creators to be rewarded for their work and for creative works to be protected from piracy and other unfair exploitation. We uphold copyright laws and encourage our users to respect them. But copyright is not just about protection for rightholders. Copyright was from its early days meant to balance the need to protect creators with the user's right to access information for teaching, learning and further creative endeavours. The mechanism that makes copyright work is in fact the exceptions and limitations combined with adequate protection of copyright. International copyright agreements guarantee exclusive rights for authors and other rightholders, but not the exceptions to these monopoly rights. Exceptions are left for national parliaments to decide, while the three step test provides a safeguard against exceptions that might be considered overly wide. Notwithstanding provisions in the Berne Convention for permissive limitations and exceptions, the result is that rightholder rights are international and guaranteed and exceptions are national and optional. This creates an imbalance from the start. The WIPO Copyright Treaty recognises the need to “maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.”

4. DIGITAL MILLENNIUM COPYRIGHT ACT

The Digital Millennium Copyright Act (DMCA) prohibits the act of circumventing a technological measure that “effectively controls access” to a work protected by copyright. Technological access

⁴ http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#preamble

⁵ *Harper & Row, Pubs. v. Nation Enterprises*, 471 U.S. 1201(a)(1)(A) (1985).

⁶ *Harper & Row, Pubs. v. Nation Enterprises*, 471 U.S. 1201 (a)(2) (1985).

controls are mechanisms such as passwords or encryption that prevent viewing or listening to a work without authorization. The law also contains two provisions that prohibit trafficking in devices that circumvent technological measures of protection. The first provision is aimed at devices and services that circumvent access controls. Specifically, it prohibits manufacturing, importing, offering to the public, or providing or otherwise trafficking in technologies, products, or services-

- that are primarily designed or produced to circumvent a technological measure that effectively controls access to a copyrighted work;
- that have only limited commercially significant purpose or use other than to circumvent such controls; or
- that are marketed for use in circumventing such controls.

The second, similarly worded provision is a prohibition against trafficking in devices or services to circumvent rights controls. Technological rights controls are mechanisms that restrict copying the work or playing it in a particular environment without authorization. There is no prohibition on the act of circumventing rights controls. Legislators believed if copies made as a consequence of circumventing rights controls were excused by copyright exceptions or privileges, there should be no liability for the circumvention. If, on the other hand, such copies are infringing, the rights holder has a claim under the copyright law.

5. COPYRIGHT AS A BARRIER

At the World Library Congress in Oslo in August 2005, over three hundred librarians from developed and developing countries discussed every day problems they encounter with copyright law. Common themes were-

- digitisation projects are being hampered because there is no exception for long term preservation. Where the material has been digitised, it is often difficult to get permission to make it available. Negotiations, even for out of print material, can be long and painstaking. If libraries are unable to preserve our cultural heritage, it is lost for future generations;
- libraries are encountering increasing limitations on the use of audio-visual formats, including the right to import, a crucial issue for small and multi-lingual countries;
- different rules apply to different formats, instead all formats should be equal in terms of exceptions which apply to their use;
- masses of content held by libraries is unavailable for digitisation, distance learning programmes, incorporation into course packs and other uses where permission from the rightholder is usually required. This is because the copyright owners are untraceable, so-called orphan works.

⁷Harper & Row, Pubs. v. Nation Enterprises, 471 U.S. 1201 (b) (1985).

⁸<http://www.ifla.org/IV/ifla71/Programme.htm#18August>

⁹Draft The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries in the Digital Environment by Ruth Okediji
http://www.iprsonline.org/unctadictsd/docs/Okediji_Copyright_2005.pdf

6. SET OF EXCEPTIONS

Ruth Okediji, Professor of Law at the University of Minnesota, USA has undertaken research in this area. After analysing the Berne Convention and examining empirical data of exceptions and limitations implemented in national laws, Professor Okediji has drawn up a list of exceptions and limitations permitted by Berne and/or incorporated into the national laws of member states of the WTO. These are exceptions for-

- Personal use: the most universally accepted limitation to the reproduction right. This may include time-shifting.
- Criticism and review: available in most countries. Article 10 of the Berne Convention allows for short quotations.
- Educational purposes: allows teachers to use extracts of copyrighted works for illustration purposes and on a variety of media, so long as the use is compatible with fair practices. Although the provision is broad enough to include distance learning, according to Professor Okediji, most countries do not avail of it (Article 10(2)).
- Reproduction by the press: countries may determine the circumstances under which copyrighted works, incidental to the reporting of current events, are reproduced (Article 10bis and 10bis (2)).
- Ephemeral recordings: broadcasting organisations may record broadcasts for an official archive (Article 11bis).
- Libraries: reproductions for preservation and replacement and other limited uses. This exception falls under the broad heading of teaching and the role libraries play in this respect.
- People with disabilities: There is no explicit limitation in the Berne Convention, but some countries have implemented limitations to copyrights to facilitate access by disabled persons.
- Computer programs and interoperability: There is no explicit limitation in the Berne Convention, but most countries have some provisions that allow computer programs to be copied for the purposes of interoperability.

7. Conclusions:

Developments in the digital setting have led to a more homogeneous array of activities and services provided by academic librarians: they assist professors and researchers in their problems involving scholarly communication—with considerable involvement in the open access movement-and collaborate in the development of e-learning activities. Such activities are increasingly linked to digital resources, whose access is contracted through licensing agreements.

Obviously there are some differences from one country to the next, but the general reality is that training about copyright was far from a priority in the education of today's academic librarians. This

¹⁰ Most of these exceptions are not subject to compensation, although some countries e.g. in continental Europe, have a levy system on equipment whereby rightowners are indirectly remunerated.

subject matter is rarely included or addressed in depth in the study programs of LIS schools. Hence, not many professionals have adequate training—not even in the United States, a pioneer in the development of the new professional role of “copyright officer/librarian” or “scholarly communication officer/librarian.” The fact is that such positions are most often taken on by professionals who become experts in the area on their own, due to a combination of experience, knowledge, and curiosity, not by means of specific training designed to provide the knowledge required.

The ultimate aim of training, whether in the academic setting or beyond, is to provide librarians with overall knowledge (not just familiarity) that will guide them through present and future initiatives at their work institutions, allowing them to take advantage of the law to achieve professional objectives. Such a level of knowledge would help librarians overcome the “defensive” attitude that stems from uncertainty about what they legally may or may not do. It would foment a positive approach, eventually transmitted to users, professors, and students, about all the guidelines, advice, and information related to copyright.

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¹¹Linda Frederiksen, *The Copyright Librarian: A Practical Handbook* (Waltham, Mass.: Chandos Publishing, 2015).