DIGITAL TECHNOLOGY AND LIBRARIES: A COPYRIGHT LAW APPROACH

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Digital technology gives libraries an excellent opportunity to improve their services. It also provides new ways of preservation and dissemination of library collections. But the different stages of digitisation of the materials in a library involve many copyright issues. There are legal problems and purely practical ones such as locating the owner of copyright. Librarians need to take note of these problems and explore possible solutions. This paper attempts to focus attention on the major copyright problems involved in digitisation of library collections.

INTRODUCTION

The advent of digital technology has altered the concepts and methods of storage and dissemination of data. This has naturally affected library services. Libraries, being storehouses of data and information expressed in a fixed form such as books, have always availed of the advantages provided by technological innovations in storing and dissemination of knowledge. The digital technology, unlike the past ones, directly affects the working of a library.

Over the centuries, library was a place where books and other records were preserved and made available to patrons at the premises itself. With the advent of printing technology which made possible production of multiple copies of a book with the possibility of easy replacement of a lost copy, lending of books to patrons so that they can take them out of the premises came into existence. The digital technology has now made it possible for a library to break the shackles of space and time. It can reach out to the user at his home. It can now issue any number of copies of a work to any number of users spread over the globe simultaneously provided the library is fully automated and its collections are digitised and the members/users are connected through an Intranet or Internet.

This transformation of a library from a building to an electronic portal is attended with many copyright issues. This paper is an attempt to look at some of the major copyright law issues connected with automation of library services and digitisation of its collection.

The metamorphosis of a traditional library into an electronic one starts with automation of its cataloguing services. The index card boxes are replaced with computers containing electronic catalogue, making the search easier and faster. In the second phase the collections are digitised and made available at the premises. In the third phase the digitised works are uploaded and made available through the Net. Copyright issues emerge in the second and third phases.

COPYRIGHT LAW OF INDIA

In order to make the issues comprehensible, it is necessary to give a brief introduction to the copyright law of India.

Copyright is one of the important intellectual property rights and like other intellectual property rights, protects contents and not containers. The properties protected by copyright are referred to as works. These include literary, dramatic, musical and artistic works, cinematograph films and sound recordings. The definitions of the works are such that most of original expressions in the above fields, irrespective of their literary, artistic or aesthetic qualities, are covered by copyright provided they...
are original. Although originality of expression is a
criterion for copyright protection, the degree of
originality demanded is not very high. Ordinarily it
means that the work should not have been a copied
one and should be the result of the labour and skill
of the person who claims to be the author. Thus a
political tract or a memorandum issued by a local
authority can claim copyright even if they do not
have any literary merit. Computer programmes are
considered as literary works.

The person who creates the work is considered the
author and the copyright ownership generally rests
with the creator, i.e., author of the literary work,
composer of the musical work, dramatist of the
dramatic work and artist of the artistic work [1]. In
the case of a cinematograph film and a sound
recording, the owner is the producer [2]. There are
exceptions to this like when the person created the
work as part of his employment, in which case the
ownership passes on to the employer [3]. In the
case of a government work, the first owner is the
government, and that of the work of a public
undertaking or an international organisation it is that
undertaking or the organisation as the case may
be [4]. In the case of a painting done or a
 cinematograph film made or a photograph taken
for valuable consideration the ownership goes to
the person who has paid for the valuable
consideration.

Copyright is not a single right but a bundle of rights.
It, *inter alia*, includes the rights of reproduction,
issuing of copies, communication to the public,
adaptation, and translation. These are transferable
rights. The owner can transfer the rights through
assignments or testamentary dispositions or
through inheritance [5]. The assignments can be
in respect of one right or more than one right or
even all the rights. The owner can also licence a
person to do any specific act which is his exclusive
right without transferring the right. The Indian
Copyright Act also enables an author to relinquish
his copyright [6]. Therefore, if an author has
relinquished his copyright in a work, that work would
be out of copyright regime.

Apart from the above-mentioned rights, which are
referred to as economic rights, the author has
certain special rights [7], generally referred to as
moral rights. These are the rights over authorship
and integrity. Acts prejudicial or detrimental to the
personality of the author are considered an
infringement of his special rights. These special
rights are inalienable.

Like other intellectual property rights, copyrights are
also for a limited period. In the cases of literary,
dramatic, musical and artistic works published
during the life time of the author, the rights last until
expiry of sixty years following the death of the author,
the count down starting from the calendar year
following the death of the author [8]. In other cases
it is sixty years from the year of publication [9]. After
expiry of the copyright, the works can be freely used.

Even when copyright exists in a work there are
certain uses which are permitted. These, *inter alia*,
include a fair dealing with a literary, dramatic,
 musical or artistic work for the purpose of private
use, including research, criticism, or review,
reporting current events, certain uses by legislature
and judiciary and so on. The Copyright Act permits
reproduction of the following works [10]:

(i) Matters published in any Official Gazette
except an Act of a Legislature;
(ii) Any Act of a Legislature subject to the
condition that such Act is reproduced or
published together with any commentary
thereon or any other original matter;
(iii) Report of any committee, commission,
council, board or other like body
appointed by the government if such
report has been laid on the Table of the
Legislature, unless the reproduction or
publication of such report is prohibited
by the government;
(iv) Any judgement or order of a court,
Tribunal or other judicial authority, unless
the reproduction or publication of such
judgement or order is prohibited by the
court, the Tribunal or other judicial
authority, as the case may be.

Libraries are given certain specific rights in this
regard. These include the following:

(a) The making of not more than three copies of
a book (including a pamphlet, sheet of music,
map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such book is not available for sale in India [11].

(b) The reproduction, for the purpose of research or private study or with a view to publication, of an unpublished literary, dramatic or musical work kept in a library, museum or other institution to which the public has access

Provided that where the identity of the author of any such work or, in the case of a work of joint authorship, of any of the authors is known to the library, museum or other institution, as the case may be, the provisions of this clause shall apply only if such reproduction is made at a time more than sixty years from the date of the death of the author or, in the case of a work of joint authorship, from the death of the author whose identity is known or, if the identity of more authors than one is known from the death of such of those authors who dies last [12].

The first provision enables a library to procure rare books not available in the market. The second provision enables a library to make available a rare document to those who need it for study or research.

LIBRARY COLLECTION

A library collection contains different kinds of materials. From a copyright angle the works in a library can be broadly classified into those in the copyright regime and those outside it. Those outside are classified as in public domain. Works in copyright regime are those in which copyright subsists. These include all original works, cinematograph films and sound recordings published in India or the author of which is an Indian [13]. India also extends copyright protection to works published in countries specified in the International Copyright Order [14] or whose author is a national of any of those countries.

If the work is within the copyright regime, permission of the owner is required for doing any of those acts, which are the exclusive right of the owner. Otherwise it would be an infringement with attendant penalties [15], which range from imprisonment for periods between six months and three years with or without fine. The ownership of copyright being a transferable one it is necessary to ascertain who is the current owner of copyright before taking measures to obtain permission.

DIGITISATION AND COPYRIGHT

The rights that come into play in the ordinary course in the digitisation of a work by a library are the rights of reproduction and adaptation. Reproduction includes the storing of a work in any medium by electronic means [16]. Adaptation includes rearrangement or alteration in a work [17]. During digitisation, sometimes rearrangements may have to be made in a work which would attract the right of adaptation.

Digitisation is the process of converting a work into a binary language that can be read by a computer. Digitisation involves storage in an electronic medium such as the hard disk of a computer or a floppy disk or a CD-ROM. The Copyright Act classifies such storage as reproduction. Hence digitisation involves reproduction, which is an exclusive right of the owner of the copyright in the work if the work is still in the copyright regime. Therefore, it is a legal requirement that permission of the copyright owner is obtained before digitising a work in the library on which copyright subsists.

Digitisation, per se, involves certain rearrangements and alterations because of technical reasons. Many a time it also involves such alterations for other reasons such as formatting, facility for searching and so on. If the work is in copyright regime such things can be done only with the permission of the copyright owner.

EXPLOITATION OF A DIGITISED WORK

Apart from further reproduction or copying, the most common exploitation of a work in the digital format are through issuing soft or hard copies of the work. When a library, after digitisation, issues such copies of the work to its members or others, not as lending, the right of issuing copies of the work comes into
play. In that case, if done without permission of the copyright owner, it will mean infringement.

**UPLOADING A WORK ON A WEBSITE**

Once digitised, a work is capable of being exploited in numerous ways. Making the work available on a website is one of the common things. Putting the work on a website involves the right of communication to the public.

As per the Copyright Act,

*Communication to the public means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available* [18].

This right is so comprehensive and overwhelming in the digital environment that it covers all communications on the Internet and Intranet. It is not necessary that the work kept on a website should have been read by another. Keeping the work on a website itself becomes an act of communication to the public. Therefore, necessary permission should be obtained before putting any work on the web by a library, if the work in question is having copyright.

**New Rights?**

Once the work is digitised a fresh set of issues arise. Experts differ on whether the new product in a digital format acquires a copyright of its own. Some hold the view that the new format is a new expression and is entitled for copyright protection. In that case the library gets a copyright over the digital format, unless as per the conditions of the permission by the owner, this new right goes to the original owner or to some other specified person. In both the cases the copyright owner of the new product will have to take measures to protect the same.

While protection of material put on website is an important issue, protection of digital copyright is a very difficult proposition, the main reason being the ease with which a digital work can be copied compared to a work in the print format. By the click of a button a whole document can be copied in a matter of seconds. Therefore, copyright owners use various technological measures to protect their works in the digital format. These include measures such as encryption, watermarking, copy control flags, macro vision and so on. Libraries may have to consider using such technologies to protect their own copyright.

**ADVANTAGES OF DIGITISATION**

Digitisation of documents has another dimension than uploading onto a website. It is many a time a method for preserving a document from destruction. Many old copies of documents with a library may be very brittle and crumbling. Digitisation is one way of preserving the document for posterity. In such a situation the need for a provision that would enable libraries to digitise their stocks for the purpose of preservation purely for archival purposes as an insurance against loss of the physical paper copy is worth considering. Such a provision, however, cannot be an open one. It will have to be provided with enough safeguards against misuse. Article 9 (2) of the *Berne Convention for the Protection of Literary and Artistic Works* (1886) provides that countries may allow for exceptions to the author's exclusive right or reproduction "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." The *World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT)* 1996, which deals with copyright issues related to digital technology and Internet extends this limitation to all rights provided by that treaty as well as those in Berne Convention.

Digitisation is done not only for preservation or archival purposes but also, rather more, on account of the other advantages and uses of the same. A digitised work can easily be transmitted to members of a library through the Net. Transmission of images and text through the Net is a communication to the public and requires the permission of the copyright owner, if the work is in the copyright regime.

Loaning between libraries is a way to reduce costs and making accessible to members of one library
the resources of another library. This is very important in the case of a developing country like India where resources are limited and where literacy is still a goal to be achieved. Digitisation really helps in this process. However, since this will affect the returns of the copyright owner a special licensing scheme may have to be devised for the same since obtaining individual permissions is not very practical.

DOWNLOADING AND LIBRARIES

Publication scene is undergoing a change in that digital publishing is making its appearance. In such a scenario should there be an enabling legislation that would allow libraries to take hard copies of a work in the digital format and issuing the same to its members is an issue that should engage the attention of library administrators as in such a situation, the rights over issuing copies and communication to the public will come into play. There are major ramifications for this issue since in days to come e-published documents may not be issued in hard copies and may not be available for purchase even in e-format after some time because of the economics of market. In such a scenario, the question of how libraries can perform their historical functions as archives of published material needs to be addressed in earnest.

Also at issue is access control measures adopted by content providers on the Internet. New legislations like the United States Digital Millennium Copyright Act (DMCA) (1998) provides an exemption for non-profit libraries to gain access to a commercially exploited copyrighted work solely to make a good faith determination of whether to acquire such work [19].

SOME SPECIAL COPYRIGHT ISSUES IN DIGITISATION

Libraries really had very little to do with copyright law in the traditional modes. The main functions of a library, such as collection and preservation of books and documents, lending them to its patrons for reading, private study or research were acts permitted by copyright laws in most countries. Some countries such as Germany have a public lending right which comes into play in the libraries lending copies of the volumes with it to the members. In such countries, the libraries were required to pay a fee or royalty to the authors for exploiting the public lending right on their works. India does not have any public lending right. Hence there was no such payment or permission required for lending copies of the works to its members or to the general public for the purposes mentioned above. The instance where the libraries were involved with a copyright issue was in allowing photocopying of a book or document. Photocopying involves reproduction and reproduction is the exclusive right of the owner. Therefore, photocopying required the permission of the owner. The United States Copyright Act exempts libraries and their employees from liability for copying made by patrons on unsupervised machines where appropriate notices are posted [20]. The Copyright, Designs and Patents Act (CDPA), 1988 of the United Kingdom (U.K.) provides that a librarian can make one copy of an article in a periodical for a person who requires it for the purposes of research and private study. This is subject to the condition that not more than one copy of the article at the same time, and that not more than one article from the same issue of the periodical is supplied. The U.K Act also enables librarians, under the same conditions, to copy part of a published edition of a literary, dramatic or musical work and supply to a patron on payment [21]. There are no such specific provisions in the Indian copyright law. Be that as it may, digitisation exposes libraries to many new issues from a copyright angle.

Before digitising any work in its collection, a library has to satisfy itself that by doing so it is not infringing any copyright in that work or any contractual obligation on the work. For example, certain stocks received as donations or bequeathments by a library may have conditionality attached with the donation which stipulate, “use only for research or reference.” In such cases digitisation may be a violation of the contractual terms.

There is a clear distinction between the ownership of a copy of a work and ownership of the copyright. For example, if the library has acquired an original painting or a manuscript it does not automatically make the library the owner of the copyright in that
painting or manuscript. Therefore, before digitising the painting or the manuscript, the library needs to obtain the permission of the copyright owner.

Ticklish problems may arise if the library decides to digitise the back numbers of newspapers and journals. This is because of the dichotomy of the rights in the contents of the newspapers and journals. The Act says:

*In the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work insofar as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work [22].*

In the absence of any specific provision in the Copyright Act on this it is a matter of opinion whether a library would be infringing the copyright of a journalist if it digitises his article in a newspaper or periodical, even as part of a project of digitising back numbers of the newspaper or journal with the permission of the proprietor of the periodical.

There are also special problems attached to photographs. The Act says,

*In the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein [23].*

To find out the actual owner of the copyright in a photograph published in an old newspaper or journal taken not by the staff photographer of the periodical is a major problem.

Then there are the articles by freelance journalists and others. Ordinarily the copyright in them rests with the author. It is interesting to recall that in *New York Times Co. vs. Tasini*, the US Supreme Court held in 2001 that the New York Times, in licensing back issues of a newspaper for inclusion in electronic databases such as Nexis, could not license the works of freelance journalists contained in the newspapers [24].

Obtaining copyright permission from the owners for the vast collections in the libraries is a major problem. There is no single source from where the details of all copyright owners can be obtained. This is primarily because copyright protection does not require any formality. In fact the Berne Convention for the Protection of Literary and Artistic Works prohibits formalities such as registration as a pre-condition for copyright [25]. While the Indian Copyright law provides the facility of registration of a copyright with the Registrar of Copyrights, such registration is not a pre-requisite for enjoying the copyright in a work.

One way this problem can be addressed is through obtaining licence from societies administering copyrights as per chapter VII of the Copyright Act, 1957 provides for such societies [26]. Registration of such societies is done "having regard to the interests of the authors and other owners of copyright, the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licences in respect of relevant rights [27]." Ordinarily only one society is to be registered to do business in respect of the same class of works. Therefore, the licence seeker will not have to search for too many societies to get a licence in a particular class of work such as literary works. Lyric writers, music composers and music publishers have such societies. There is also a society for photocopying rights. But there are no societies of literary authors. If there was a society of all literary authors it would have been easy for institutions such as libraries to negotiate and take licence for digitising the works in their collections.

**CONCLUSION**

Libraries cannot keep away from technological progress. Technology has to be harnessed for better
servicing by the libraries. But while doing so, the technical problems predominate and the legal issues involved are not given adequate attention. Identification of the issues is the first step towards finding solutions. This paper has been an attempt to bring into focus the major copyright issues involved in the digitisation of library collections. Keeping in view the great advantages that can be gained from the availing of the new technology, it is necessary to move towards finding solutions to the problems. This would mean that the library community in India needs to play a more active role than hitherto in the area of copyright legislation in the context of digital libraries as they only would be able to guide the policy and law makers in the matter of making balanced provisions in the law that will facilitate libraries performing their basic objectives in the new technological era. This responsibility of librarians is particularly onerous since libraries in countries like India are often the only entities that provide access to the vast majority of people, including students and researchers, to copyrighted works that may not remain in market.

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