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COPYRIGHT GUIDE FOR INDIAN LIBRARIES

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Disclaimer: This Guide should not be treated as a legal opinion. In specific situations professional legal advice ought to be sought. The authors' opinions are personal.

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It is with pleasure that I write the foreword for The 'Copyright Guide for Indian Libraries' – a joint endeavour of the National Digital Library of India and IIT Kharagpur.

The Guide comes at a time when there is enormous ambiguity as to the rights and limitations of libraries while using and giving access to copyrighted works. It has been put together by a team of copyright experts led by Dr. Ganguli who enjoy immense credibility. The fact that the same has been compiled, put up for comments and finalised during the COVID-19 pandemic, speaks volumes of the commitment with which the team has worked.

It is only when books are written, authors are able to monetise their works and access is given to the readers, that a vibrant copyright industry can thrive and survive. Authors and publishers need both readership and revenues. Neither is more important than the other. Libraries, give readership which authors need. They are the first place of access to books for any student or academician. Having a copyright guide to understand both the rights and limitations of the use of copyrighted books is therefore essential, which is the function of this guide.

The guide serves as a ready reckoner for those who wish to understand the basic principles governing copyright law. It deals with the issues of non-commercial public libraries in a succinct manner. It explains the manner of digitisation/preservation of books. The content of the guide relating to Fair Dealing is quite extensive and sets out how libraries can rely on fair dealing provisions. Lastly, the precautions to be taken while entering into licensing arrangements or taking subscriptions are pithily captured. I hope this is the first step towards creating a national policy for use of copyrighted works by libraries.

The guide rightly gives the message that libraries ought to respect the rights of owners. In my view, use of copyrighted works in libraries has to be based on the principles of '**Mutual Respect**' – respect for the rights of Owners and for the accessibility of Users.

I commend the NDLI and IIT-Kharagpur for having embarked on this project for preparation of the Guide and for its successful conclusion.

Prathiba M. Singh
(Prathiba M. Singh)

FROM THE DESK OF NATIONAL DIGITAL LIBRARY OF INDIA (NDLI)

The National Digital Library of India (NDLI), sponsored by Ministry of Education, Government of India, is an initiative envisaged to educate, enable and empower young Indians from the very grassroots with quality knowledge and learning resources across geographies, using the power of digital. However, like every new wave possesses its own set of challenges, execution of our vision of a ubiquitous digital knowledge resource has brought forth its own techno-legal quicksand. As gatekeepers of knowledge standing at the door of a digital era, modern-day librarians are frequently faced with multifarious issues with regards to copyright.

Copyright as a subject is typically not well understood, and librarians who deal with a large volume of “copyrighted works”, are often not fully aware of its implications. Copyright issues, both genuine and apprehensions, cause road-blocks in the integration of Institutional Digital Repositories (IDRs). NDLI, after extensive deliberations in multiple fora, decided to facilitate the creation and publication of an easy-to-understand guide on Copyright for Librarians in India covering both non-digital and digital libraries.

On 30th August 2017, in an event in IIM Ahmedabad to celebrate the 125th Birth Anniversary of the legendary Dr. S. R. Ranganathan, Prof. Prabuddha Ganguli, the then Visiting Professor of Rajiv Gandhi School of Intellectual Property Law at IIT Kharagpur, delivered a talk on copyright and knowledge access, which was attended by over 150 librarians and information professionals. The participants of this interactive session emphasized the urgent need for a basic manual on the Copyright Act in India. Late Dr. H Anil Kumar, the then Librarian in Indian Institute of Management Ahmedabad and Prof. Ganguli with a team of dedicated librarians in India collated, classified, and structured the copyright-related queries of the relevance of library stakeholders.

NDLI organized the first National Workshop on Copyright Issues in Digital Libraries on 9th and 10th February 2018 under the able leadership of Prof. Prabuddha Ganguli and support from Dr. B. Sutradhar, Librarian, IIT Kharagpur. The workshop was attended by over 200 libraries and information professionals from across India. This meeting deliberated on results of the August 2017 discussions including those faced by NDLI in its ongoing efforts to provide a seamless multilingual platform of information and data resources.

Illuminating insights into the Copyright Act, possible pitfalls, exceptions to the Copyright Act in India especially applicable to libraries, Copyright Related Case Studies, and Global Good Practices were presented by a team of experts, namely, Mr. Anjan Sen, of Anjan Sen Associates, Prof. Shreya

Matilal of IIT Kharagpur, Mr. G. R. Raghavender, Joint Secretary, Department of Justice, Ministry of Law & Justice, who was a key member of the team drafting Copyright Act 2012, and Prof. Ganguli. A syndicated workshop was also conducted and the proceedings containing the inputs of the participants was documented. A clear action for NDLI emerged with the decision to initiate the preparation of a Copyright Guide covering both non-digital and digital libraries in India to familiarise librarians with the nuances of the Indian Copyright Act, with the objective of aiding our librarians to efficiently perform their duties with due regard to the copyright related issues.

NDLI put together a team of distinguished volunteers comprising Prof. Prabuddha Ganguli, Mr. Jagdish Sagar (Copyright and Entertainment Lawyer), Prof. Vishwas Devaiah and Prof. Indranath Gupta (both faculty at the Jindal Global Law School) to prepare the copyright guide. The team undertook the arduous task of analyzing over 300 queries raised, collated, curated, and structured into broad categories in the IIM Ahmedabad and National Workshop on Copyright Issues in Digital Libraries and prepared the first draft of the Copyright Guide.

A brainstorming session to deliberate on the first draft of the guide was held on the first day of the National Workshop on Adoption of Rights Statements for Digital Libraries in India organized by NDLI during 7th and 8th September, 2019. The drafting Team, together with Prof. Padmavati M (Faculty and the then Dean of Rajiv Gandhi School of Intellectual Property Law at IIT Kharagpur), Prof. Shreya Matilal, Mr. Hoshier Singh, (Registrar of Copyright, Government of India), Dr. B Sutradhar, and Prof. Partha Sarathi Mukhopadhyay (Professor, Library and information Science, Kalyani University) and several participants of the workshop including Mr. N.V. Sathyanaranaya (MD Informatics (India) Ltd.), provided significant inputs to the first draft.

The drafting team incorporated the suggestions of the September 2019 Workshop and prepared the second version which was put up for public consultation on the NDLI Website in August 2020. NDLI initiated an additional special drive to individually reach each and every participant of the previous workshops for their feedback on this draft version. At the end of 6 months of public consultation, over 50 critical and constructive responses were received from the stakeholders. These were duly considered and addressed while preparing the final version of the Guide.

This Guide is an easy-to-use manual to hand-hold the librarians, information professionals, and stakeholders on the

basic features of the copyright law in India, to be read with the relevant provisions of the Information Technology Act in India. The guide is intended to assist them to appreciate the copyright-related issues that impact the functioning of non-digital and digital libraries including digital platforms such as the NDLI. It is to be understood that legal advice ought to be sought as every copyright issue is to be evaluated in its specific context. It is expected that several questions will emerge while using the guide by the stakeholders.

We would encourage the users of this guide to provide their feedback for the next editions of the guide to address. During the preparation of this guide, NDLI has realised that there are several gaps especially related to the library exceptions in the Indian Copyright Act (as amended in 2012). NDLI hopes to

represent these gaps with proposed amends to the Copyright Act for enhanced and affordable access to information and knowledge in the digital platforms.

We thank the Team and all participants in the process of developing of this manual for their voluntary and selfless contributions. We are hopeful that librarians and information professionals will find this Guide handy and useful to tackle effectively the multifarious issues related to copyright for both non-digital and digital libraries. We are indebted to Justice Prathiba M. Singh for her erudite foreword to this guide.



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12th August, 2021

■ ACKNOWLEDGEMENTS

The idea to have a copyright guide for Librarians in India germinated during the talk that was delivered by Professor Prabuddha Ganguli in IIM Ahmedabad on 30th August 2017 on the occasion of the 125th Birth Anniversary of the legendary Dr. S. R. Ranganathan which was attended by over 150 librarians and information professionals.

Post this talk, Late Dr. H Anil Kumar, the then Librarian in Indian Institute of Management Ahmedabad with his dedicated team consisting of Dr. Hiral Patel, Mr. Mallikarjun Dora and Dr. M. Panduranga Swamy, took up the arduous task of collating all the copyright-related queries put forth by the participants. We are very appreciative of the intense efforts of this team for classifying and structuring the questions, which are essential pillars of this copyright guide which is intended to be an easy-to-understand manual taking librarians through the basics of Copyright Act in India together with the Information Technology Act.

Inputs from Professor Shreya Matilal of the Rajiv Gandhi School of Intellectual Property Rights, Shri Hoshiar Singh, Registrar of Copyright, Government of India, and Dr. G R Raghavender, Joint Secretary, Department of Justice, Ministry of Law & Justice, Government of India at the initial stages of this work is gratefully acknowledged. We are particularly grateful to Mr. N.V. Sathyanaranaya, MD Informatics (India) Ltd for his constant encouragement and inputs throughout the course of this work.

We have had the benefit of discussions with innumerable librarians, copyright professionals, and experts during the preparation of this guide addressing issues that may impact the work in the diverse operations of non-digital and digital libraries including digital platforms such as the National Digital Library of India (NDLI). We thank them for their exceptional contributions.

The spontaneous continued and ardent support of the National Digital Library of India (NDLI) provided the most facilitative platform for the preparation of this guide. We are most grateful to each and every member of the NDLI team for extending their help at every stage of this project. A draft version of this guide was put up for public viewing and comments for several weeks in 2020. We thank each and every stakeholder who so meticulously studied the draft and offered their comments, which ensured that the guide addresses the key copyright-related issues that librarians and information professionals face in the execution of their daily Functions.

We are indebted to Justice Prathiba M. Singh for her insightful comments and foreword to this guide.

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A Copyright and entertainment lawyer practising independently since 2012, Jagdish Sagar's main practice is in the music industry, films and performers' rights. However, his expertise also includes other copyright areas and some general practice including constitutional writ litigation. Earlier, as a civil servant, he participated in the TRIPS negotiations as India's sole copyright negotiator, and steered major TRIPS-compliant copyright amendments to India's copyright law; having exposure to international copyright has also given advice in this area. Has frequently spoken on copyright issues in India and abroad.



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An author of 6 books on Intellectual Property Rights, publications and contribution to IPR over the decades, he has received recognitions and awards from national and international agencies. He has been practising in the field of Intellectual Property Rights since 1991. Since 2001 he has been managing his consulting firm as CEO of VISION-IPR offering services in the management of Intellectual Property Rights and Knowledge Management. He held the prestigious position as Honorary Scientific Consultant for Innovation and IPR matters to the Office of the Principal Scientific Adviser, Government of India from 2005 to January 2018. He is also an international consultant to the World Intellectual Property Organisation (WIPO). All India Council for Technical Education (AICTE) has engaged him as a "MARGADARSHAK" to mentor several Universities in India. He is also Co-Principal Investigator in the National Digital Library of India (NDLI) project at IIT Kharagpur and Advisor to IIT Jodhpur.



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■ INTRODUCTION

Expressions in diverse forms are as old as human existence and have served as means of communication, documentation & recording of thoughts, events, and feelings. Societal evolution and sophistication in technologies has not only resulted in irreversible changes in the nature and forms of expressions, but also the diverse tools and means for their fixing and transmission. Printing, photography, recording & transmission of sound and telegraphy were the early disruptive technological advances. The last few decades have experienced unprecedented advancement in technologies related to reproduction, storing, transmission and transformation of information in digital form. All such developments have collectively widened the opportunities for creative expressions including their archiving, adaptations, transmission, storage, and use.

The creators of expressions aspire for the widest distribution in society and use of their creations. Simultaneously, such creators desire a fair return for their efforts, protection against unauthorized reproduction & misuse, and reasonable recognition as fuel for their continued creative endeavours. Copyright and the Related Rights as one of the tools of Intellectual Property Rights (IPR) protects the broadest range of creative works not in the public domain. Copyright by its very nature interfaces with works that may be classed as literary, dramatic, musical, and artistic works including painting, architecture, works of artistic craftsmanship including industrial drawing, sculpture, computer programs and computer-generated works, lectures, films and (in India and some other countries, in sound recordings) etc. Neighboring rights or related rights cover broadcasts, cablecasts, (and, in some countries, sound recordings).

Technologies related to creation, reproduction, storage, transmission and communication have dynamically influenced and impacted copyright laws in terms of their jurisprudence, scope, definitions, nature, and extent of rights, features of enforcement, jurisdictional aspects, etc.

Librarians and Information professionals are engaged in dealing with copyrighted and non-copyrighted material in their regular activities related to creating and maintaining collections of books, journals, reports, and documents of numerous types, ensuring their preservation, providing for their access and distribution by many means/mode to the public (e.g. facilitating borrowing, photocopying, interlibrary loans), publishing and making available to the public announcements of new arrivals in the library collections, creation of metadata to aid in identifying, searching & retrieving of targeted information, providing electronic links of their collections to digital platforms as digital libraries, etc.

This Copyright Guide for Libraries in India has been developed to create an easy to understand manual and use the nuances of the copyright laws in India together with the Information Technology Act in India in the context of diverse operations in non-digital and digital libraries including digital platforms such as the National Digital Library of India (NDLI).

What is Copyright?

"Copyright" connotes the bundle of "exclusive rights" (subject to certain exceptions as defined in copyright law) that the law confers on the owners of the copyright. Copyright is purely a statutory right i.e., there is no copyright except to the extent provided by statute, namely (in India) the Copyright Act, 1957 (the "Act") which has been amended several times, most recently in 2012. The Copyright Rules, 2013 provide for certain procedural matters.¹

Copyright subsists by operation of law from the moment a work is created: i.e., there is no need to apply to any authority to enjoy the right as in, for example, the case of patents and trademarks. In India. When an author is a natural person (i.e. an individual human being) the term of copyright is sixty years from the beginning of the year following the year of the authors' death or, in the case of joint authorship (i.e. where the contributions of different authors are not distinguishable) the year of the death of the last surviving author: this obviates the need to ascertain birthdays though it remains necessary to ascertain the year of death which, fortunately, is a less difficult task than in the pre-digital era. In certain other cases, like films or sound recordings, or where authorship may be of a corporate nature, the year of publication (i.e. the making of the work available to the public by any means) substitutes the year of the author's death in the same formula (i.e. sixty years from the commencement of the year following the year of first publication). The term of copyright cannot be extended.²

Since copyright subsists by operation of law, neither registration nor any other procedure is mandatory. The © mark with the name of the author or copyright owner and the date maybe inserted in the form of a copyright notice in the work though it too is not mandatory. However, on registration of the work in the Copyright Office, details such as the names, titles of the registered works, names and addresses of authors, publishers and owners of copyright, etc., are entered in the Register of Copyrights, which can serve as evidence of the existence of the work at the time of registration. A copyright registration certificate is of evidentiary value to that extent only: it is not evidence of copyright ownership.³

Copyright subsists in literary, dramatic, musical, and artistic works and cinematograph films; sound recordings also enjoy copyright in India and many other countries, though not universally. There are no comprehensive definitions of literary, dramatic, musical, and artistic works, but the Act does specify instances where the copyright meaning of the term might not be obvious. For example, computer programs are literary works, as are compilations including databases and tables (if their structure and organization show some degree of intellectual contribution; but not the facts compiled themselves). "Artistic works" include what one would expect, like paintings, sculptures, engravings, and drawings; photographs and works of architecture (including architectural models) and works of artistic craftsmanship are also artistic works. However, the term "drawing" also includes diagrams, maps, charts, and plans without regard to merit. Copyright law generally applies the ordinary, common-sense meaning of terms subject to the expanded definitions that we have just referred to. It should be noted that merit is irrelevant; the work must merely be original in the basic sense of not being a reproduction of another work and copyright requires only a very minimal degree of mental effort to subsist in a work. Copyright does not extend to ideas, mere facts, algorithms or mathematical formulas etc., hence it is commonly identified as "expression" in an "idea/expression dichotomy".

"Neighbouring rights" or rights related to copyright include the rights of broadcasters against theft of their signals by other broadcasters and against cablecasts; in some countries, sound recordings; and performers' rights, i.e., aural or visual performances of music, dance, or stage or screen acting, or variety entertainment like juggling, acrobatics, magic etc. Like copyright, neighbouring rights are purely statutory and subsist by operation of law, the general distinction between copyright and neighbouring rights is that the latter are rights in subject matter other than "works" created by "authors".

The main rights of copyright owners are a bundle of exclusive rights, i.e., the copyright owner's exclusive right to do or to authorise certain acts. These include the rights to reproduce a work (including electronic storage), the right to issue copies or to communicate the work to the public by all or any other means such as broadcasting, performing a work in public i.e., before an audience whether physical or virtual, and making a work available on the internet. Further rights include the right to translate a work or to adapt a work (e.g., making a film or play based on a novel, adapting a musical work to a different genre etc). In the case of computer programs, films and sound recordings, the copyright owner also has exclusive rights to rent out the work for commercial purposes, or to sell the work or offer it for sale—this is an exception to the general rule of "exhaustion" under which copyright is not infringed by the subsequent sale of copies already in circulation (for example the sale of second-hand books). It is pertinent to mention here that under the Copyright Act the term "publish" has a very wide meaning, covering all forms of issuing copies and all forms of communication to the public.

It is important for librarians to understand that copyright subsists in intangible property. In the most obvious and common case of a book, copyright subsists in the contents of the book, not in the physical copy. For this reason, copyright subsists in the contents regardless of the format or the vehicle in which a copyright work may be expressed or communicated to the public.

The owner of copyright can enforce his rights both in civil and criminal courts. Until very recently the Copyright Act also vested certain powers in the Intellectual Property Appellate Board as an alternative forum to the Courts for resolution of issues related to assignments and payment of royalties. specific circumstances related to copyright; the IPAB has now been abolished and its functions, though different from normal judicial proceedings, have been transferred to the High Court. The Customs Department under the Commissioner of Customs also has some powers to seize infringing imports in conjunction with courts that have jurisdiction. ⁴

Some of the terms that librarians may come across in connection with copyright are included in the Glossary.

The concept of Public Domain

Public Domain comprises of Work/Material which is not protected by copyrights. A work may not be copyright protected for the following reasons :-

(a) Works in which the term of copyright has expired; (b) Material, which is not copyrightable, e.g., because it is not "original"; (c) Works which were created, or whose authors died, before there was any copyright law; in India that means before the Imperial Copyright Act, 1911 came into force

What are the Rights of Creator and Who would be the Owner of Works

The Rights granted to a Copyright owner are

1. Economic Rights,
2. Moral Rights (Author's Special Rights) ⁵

In our Act, as in the laws of many other countries, economic rights are designated as "copyright" and moral rights are treated as a separate right.

"Economic Rights" allow the copyright owner to gain monetary benefits from the work. There are mainly two ways for the owner to gain monetary benefits-

First, the copyright owner has the option of granting licenses which permit others to use the copyright material. These licenses are mostly non-exclusive (i.e do not prevent the licensor from licensing the same rights to others) and do not involve transfer of ownership or title (sec.30). For instance, radio channels acquire licenses from the copyright owner to play their music on the radio.

Second, is the right to sell the ownership of copyright. The ownership of copyright is transferable by "assignment." The transfer should be done in writing and must also identify the specific rights assigned while mentioning the period and territory.

"Moral rights" of an author, named "author's special rights" in India's Copyright Act: these comprises two rights generally known (though the Act does not use these terms,) as the "Right of Paternity", and "Right of Integrity".

The **"Right of Paternity"** refers to the right of an author to claim authorship of the work and the right to prevent all others from claiming authorship of his work. Moral rights also seek to protect the integrity of a work and the author's connection with it. The author can seek legal remedies in a Court for infringement of his right to restrain or claim damages in respect of any distortion, mutilation, modification or other acts in relation to the work, if such distortion, mutilation, modification or other acts would be prejudicial to his honour or reputation. ⁶

Unlike, economic rights, moral rights in India and several other countries are perpetual (capable of being exercised by the author's legal representative after the author's death) and not subject to any limited term. Further, by their very nature moral rights cannot be transferred, though it is possible (except in a few countries) to waive them.

Economic Rights

Section 14 (a) of "The Act" gives the copyright owner to the exclusive right to the following in case of 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;
- (vii) 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);

For further information on Economic Rights one can read the entire sections 14 and 17.

Moral Rights of the Author-

Section 57. Author's special rights.—

(1) Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right—

1. (a) to claim authorship of the work; and
2. (b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation: Provided that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer programme to which clause (aa) of sub-section (1) of section 52 applies.

Explanation.— Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section.]

(2) The right conferred upon an author of a work by sub-section (1), may be exercised by the legal representatives of the author.

Transfer of Copyright

Section 18. Assignment of copyright.—

(1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole of the copyright or any part thereof: Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence.

(2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

(3) In this section, the expression "assignee" as respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence.

Section 19 Mode of assignment.—

[(1)] No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorised agent.

(2) The assignment of copyright in any work shall identify such work, and shall specify the rights assigned and the duration and territorial extent of such assignment.

(3) The assignment of copyright in any work shall also specify the amount of [royalty and any other consideration payable], to the author or his legal heirs during the currency of the assignment and the assignment shall be subject to revision, extension or termination on terms mutually agreed upon by the parties.

(4) Where the assignee does not exercise the rights assigned to him under any of the other sub-sections of this section within a period of one year from the date of assignment, the assignment in respect of such rights shall be deemed to have lapsed after the expiry of the said period unless otherwise specified in the assignment.

(5) If the period of assignment is not stated, it shall be deemed to be five years from the date of assignment.

(6) If the territorial extent of assignment of the rights is not specified, it shall be presumed to extend within India.

For further information on transfer of copyright, one can read the entire sections 18 & 19.

Licences

Section 30. Licences by owners of copyright. —

The owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by licence in writing by him or by his duly authorised agent:

Provided that in the case of a licence relating to copyright in any future work, the licence shall take effect only when the work comes into existence.

Explanation.— Where a person to whom a licence relating to copyright in any future work is granted under this section dies before the work comes into existence, his legal representatives shall, in the absence of any provision to the contrary in the licence, be entitled to the benefit of the licence.

What Works would not receive Copyright protection

Copyright protects "expression," it does not protect mere ideas, and concepts including but not limited to procedures, methods of work and mathematical concepts.

What works would not receive Copyright protection-⁷

Section 15 of the Act- (1) Copyright shall not subsist under this Act in any design which is registered under the [Designs Act, 2000 (16 of 2000)].

(2) Copyright in any design, which is capable of being registered under the [Designs Act, 2000 (16 of 2000)] but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright or, with his licence, by any other person.

Copyright ownership:

The author of a work is normally the first owner of copyright. However, section 17 of the Act lays down a few exceptions to this rule, which arise mainly in the case of works created by an employee for an 'employer.'

The general rule is that where a work is created under a contract of service or apprenticeship the first owner of copyright, absent a contract to the contrary, is the employer (though he does not become the author, and the author retains his moral rights unless waived). This situation of a "contract of service" does not apply to a contract for service where the author is an independent contractor: such an author, to whom work has been outsourced, does not lose copyright ownership absent a contract to the contrary.

However, there are a few special cases to bear in mind:

Firstly, unlike other instances of works created under a contract of service, in the case of a literary, dramatic or artistic work (including of course a photograph) made in the course of employment by a newspaper or magazine/ journal etc. the employer's first ownership of copyright is limited to the use of the work in the same newspaper or magazine, and for all other purposes the author remains the first owner of copyright.

Secondly, in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film (as distinct from its underlying works) made for valuable consideration, the person at whose instance the work was created is the first owner of copyright; in such cases an independent contractor who may have made the work is not the first owner of copyright.

Thirdly, films are treated as a special case: even where the "underlying works" like music, lyrics, screenplay, choreography, artistic works such as set design, etc. are made for a film under a contract of service, the producer (who remains author of the film per se) is not the first owner of copyright in the said underlying works though made by his employees and has to obtain assignments from them as authors thereof. However, in India, as in many other countries, the producer i.e., the person who takes the initiative and responsibility for making the film, is the author of the film as a whole. The rationale for this is that the film is more than the sum of its parts and the actual contributions of others like screenwriters, directors etc. may vary from film to film. (On the other hand, in some countries, authorship vests in a group of contributors to the film but there are restraints on their preventing the producer from exploiting the film.)

Fourthly, in the case of Government works (i.e., works made for the Government whether by Governments servants or not) the first owner of copyright is the Government, absent an agreement to the contrary. The same principle applies to works made for a public sector organisation or for an international organisation whose copyrights are protected in India by notification under Section 41 of the Act.

Finally, a note of caution: The North American term "work for hire" is gaining popularity in India, quite unthinkingly. It should be eschewed because in some situations in US law what we call contracts for employment are treated just like our contracts of employment, and thus a person outsourcing work to an independent contractor becomes the first owner of copyright where he would not in India; further, US law does not distinguish between authorship and first ownership of copyright in such cases, hence the first owner of copyright who is not the author in Indian law, may be designated the "author" under the US "work for hire" doctrine.⁸

International Conventions and Agreements

India is a member of the main international conventions and agreements on copyright and neighbouring rights including the Berne Convention (the principal Convention on copyright); the Universal Copyright Convention (UCC); the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation, and the Agreement on Trade-Related Aspects of Intellectual Property Rights; the WIPO Copyright Treaty; the WIPO Performances and Phonograms Treaty; The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MVT).⁹

By virtue of the Berne Convention, any work first published outside India in any of the convention countries enjoys protection in India at par with the protection granted to Indian works. It is automatic as it does not require any registration or procedure. However, there is an exception: if the term specified in the country of origin is shorter than that in India, the work will be protected for the shorter term in India and the converse in the case of Indian works protected in other countries.¹⁰

For example, in Canada the copyright protection term is life of the author plus 50 years whereas in India it is the life of the author plus 60 years. Therefore, any work produced in Canada will have 50 years of protection after the death of the author in India rather than 60 years (the period of copyright protection granted under our Act.).

The same applies to neighbouring rights including performers' rights, broadcast reproduction rights and to the agreed exceptions for the disabled in the case of countries that have joined the Marrakesh Treaty.

COPYRIGHT AND LIBRARY OPERATIONS

Library operations need to be carried out respecting the rights of copyright owners. However, the Act carves out some exceptions specifically for libraries: it is important to avail of them within the law. Further, it is necessary to be aware of the rights and obligations of users of the library in order to enable them to make lawful use of their rights.

Copyright law is not generally concerned with the ownership of physical copies, but rather with the intangible rights subsisting in their contents. Generally, a person who commits an infringing act will be liable regardless of who owns the physical copy.

As mentioned before the "Act" does allow certain exceptions for the libraries, however, it does not permit the libraries the freedom to achieve the overarching goal of providing universal access. Unfortunately, the lack of access has now become a differentiation between the haves and the have nots, something the courts have time and again tried to overcome. These attempts giving some respite have also led to lack of clarity.

"Non-commercial public library"

Digital storage for archival purposes and the reproduction for the library's use of books that are not available for sale in India are two special exceptions enjoyed only by "non-commercial public libraries".¹¹

"Non-commercial public library," though the term is not specifically defined in the Act, includes any library (a) that is either maintained/ established/ aided by the Government or notified by the Government as a public library or whose primary activities are the collection and preservation of books, periodicals and other documents and the provision of library services and (b) which makes its collection accessible to the public.

To elaborate: the term "commercial" essentially connotes activities involving trading. A "non-commercial public library" would be one that is

(a) non-commercial in this sense (whether or not earning a profit by other means, like membership fees) and (b) is "public".

The term "public" is wide: whatever is not "private" in the commonly understood sense of being limited to a private circle of family and friends is "public". For our purposes the library's collection should be accessible to the public (notwithstanding that it may impose membership conditions like paid membership).¹²

Digital storage for preservation

Under Section 52(1)(n) of the Act a non-commercial public library may "store work in any medium by electronic means for preservation if [the] library already possesses a non-digital copy of the work."

This is the only one of the library exceptions that apply to any kind of work, i.e., literary, dramatic, musical, or artistic works or films or sound recordings. The precondition is that the library should possess a non-digital copy. "Possession" would not include a copy on a temporary loan: it should be with the library on a permanent basis.

The purpose being preservation, the library is free to create a non-digital copy of the work from the preserved digital copy to replace the non-digital copy that has been lost or destroyed or is in such a damaged condition that it cannot be used for library operations.

Section 52 of the Act makes a reference to non-commercial public library under sub-sections- 52 1 (n) the storing of a work in any medium by electronic means by a non-commercial public library, for preservation if the library already possesses a non-digital copy of the work;

52 1 (o) 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 [non-commercial public library] for the use of the library, if such book is not available for sale in India;

Making of a Non-Digital Copy from a Preserved Digital Copy

It is desirable that libraries should avail themselves of the exception under Section 52(1)(n) of the Copyright Act by making digital copies of their non-digital collections in order to ensure that at all times copies of the work are available in the library. An indexed record of such digital copies must be maintained at all times.

Template for record keeping

MAKING OF A DIGITAL COPY FROM A PRESERVED PHYSICAL COPY

The Copyright Act, 1957 governs the preservation of a work through electronic means by a non-commercial public library.

It is hereby declared that:

1. (Title of the work /literary work/dramatic work/musical work (sheet music/ sound recording)/cinematograph film (celluloid/DVD etc.) as recorded in the library catalogue has been maintained by the library from (year acquired by the library).
2. That due to (mention the reason) the work is mutilated /destroyed on (date).
3. A digital copy has been created from the PHYSICAL copy on (date) and has been included in the library collection

Date:

Signature of the Authorized Person:

Copies of unavailable books

Under Section 52(1)(o) of the Act the person in charge of a non-commercial public library, or persons acting under his or her direction, may make up to three copies, for the use of the library of a "book" that is not available for sale in India. This exception is limited to non-digital formats.

Second-hand books available from online retail or serendipitously from a second-hand bookseller should not be considered as being available for sale in India. Further, the courts have held that items priced beyond the means of most people may also be treated as not available for sale in India. A "book" need not be sheets of paper bound between hardcovers, though that is its usual sense. It is broadly, a physical carrier of two-dimensional works (including two-dimensional representations of three-dimensional works).

Under the Act "book" includes (but is not limited to) a pamphlet, sheet of music, map, chart, or plan. Issues of printed journals or magazines, newspapers, and such other print documents would also count as books. If a book becomes available for sale in India after copies have been made in good faith under this exception the library may continue to use these copies as they were lawfully made at the time when made and the Act does not restrict their use (in contrast with the digital storage exception, which is strictly for preservation.)

Template for Record Keeping

Three Copies of a book/ a pamphlet/ sheet of music/map, chart/ plan, if it is not available for sale in India

The Copyright Act, 1957 governs the making of three copies of a book/ a pamphlet, sheet of music, map, chart or plan by a non-commercial public library if such work is not available for sale in India.

It is hereby declared that the library:

1. Made reasonable attempts to acquire (Title of the work) published by (name of the publisher, year of publication) by placing an order for the same on (date).
2. That the same was not made available to any distributor in India as on (date).
3. Under the direction of the person in charge-of-the-library three copies of the book/ a pamphlet/ sheet of music/ map/ chart/ plan was made on (date) for the use of the library.

Date:

Signature of the Authorized Person in charge of Digitisation

DIGITISATION

Modern day libraries are custodians of knowledge and cultural materials. Physical libraries are slowly transitioning into digital spaces, providing access to books and journals. In some instances, libraries are also digitizing and archiving materials that are in the public domain and uploading copyrighted material with the sole aim of increasing access to knowledge or to enable people to engage with cultural and historical materials. However, it is important for libraries involved in digital archiving of materials to ascertain ownership of copyright in such materials and get permission to digitize such material for public non-commercial use.

Projects on digitization of information resources, conversion of physical documents into digital formats for preservation and diverse uses are common activities in most institutions. Extreme care with respect to copyright must be exercised in executing digitization projects. Assessment of what may be digitized merely for the creation of archives for preservation and / or distribution and made accessible to users is now an imperative. Similarly, execution of interlibrary loans of e-resources either created or procured, must also be subjected to a process of "due diligence" with regard to copyright.

Section 65A titled "Protection of technological measures" and Section 65B titled "Protection of Rights Management Information," which are discussed further below, link the Copyright Act with provisions also covered under the Information Technology Act 2000 as amended from time to time.¹⁴

Libraries serve as the nerve-centre of knowledge storing and circulation in educational institutions, especially in the developing world where access to knowledge is a key concern.

Libraries tend to have numerous electronic resources. The specific exceptions for libraries mentioned under the Copyright Act do not extend to libraries having only electronic books in their collection. Before making any further copies of electronic books, libraries must rely on the contracts that they have signed with copyrights owners.

Access to educational materials which are necessary to pursue higher education in a developing country like India is one of the primary concerns and the judiciary has intervened to clarify that libraries can play a key role in the creation of course packs. Within the meaning of the phrase "in the course of instruction"¹⁵ and following the Delhi High Court judgement, libraries are allowed to prepare digital course packs of books as prepared by and used by educational institutions for instructional use.

Once prepared, digital course packs are likely to be widely distributed and therefore libraries are better off implementing such access controls as they are able to. These access controls will limit the use of digital course packs only to the users who have institutional affiliations.

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packs are likely to be widely distributed and therefore libraries are better off in implementing certain access controls. These access controls will limit the use of digital course packs only to the users who have institutional affiliations.

Negotiating Licences, Subscriptions to Books and Journals Especially with Regard to Electronic Resources

It has become necessary for libraries to maintain electronic resources and provide access to their patrons. Electronic resources could be in varied forms like subscriptions to electronic databases, e-books, e-journals, etc. It is necessary to understand that this primarily requires a library to sign licensing agreements with content providers. This generally entails giving up specific rights which a library would normally have if it had bought a hard copy of a book or journal. For instance, the library is not the owner of online resources like Journals.

It is important to note that libraries do not necessarily own the e-book or e-journal but will only have limited access to the content as per the terms of the licensing agreement. The licensing agreement in most instances will dictate the terms of access and it might be more restrictive than what copyright law might allow as the terms of the contract may require a library to sign away privileges that libraries are provided under copyright law.

The terms of the licence that library signs to gain access to electronic resources might narrow down access to content. Licensing content is more like renting than buying something. Publishers and information vendors may add several conditions to the use of their digital resources. Similarly, the content may be available to some, or all, of the library's users. For instance, a subscription might allow the library to store the content in a standalone computer in which case the library cannot display the content on multiple computers or provide access to the material through the network wherein multiple users could access the content at the same time.

Further, there are multiple ways in which a library can gain access to electronic resources. There is a possibility of the library signing a *Single Institution Licence*, *Academic Consortia Licence*, *Public Libraries Licence*, *e-book and journal archive licence*, and lastly the *free trial licences for a limited duration*. Each of these licenses has its own nuances, advantages, and disadvantages. However, regardless of the type of licence the library enters into, it is necessary to keep in mind whether there are restrictions as to who can access the content. Who are the authorized users? Does the licence allow the library to make the electronic database available only to its patrons or to any visitors or walk-in users of the library?

In most instances licenses limit access to such databases only to authorized users of the library, especially if the content is allowed to be accessed through the library's network.

Exceptions

By "exceptions" we generally mean specific exceptions like those carved out in Section 52 of the Copyright Act. It is to be appreciated that these are acts which would be infringing, but for their inclusion in Section 52.

In Section 52, there are exceptions specific to libraries, which are discussed below.

Other exceptions in Section 52 include activities related to personal use, review and criticism, various activities in educational institutions (including use of works in the course of instruction (52(l)); performing a play or showing a film or sound recording to a limited audience in the institution 52(j), certain uses of government / public documents, news reporting, cases where it would be difficult or unreasonable to enforce copyright e.g. Architectural works in public places, public statues and so forth.

Section 52(1)(zb) provides for access to copyrighted works in special formats for persons with disabilities.

It may be noted that the term "museum" or the expression "other institutions to which the public has access" has been included in Section 52(1)(p) of the Act.

The term "Archives" has been included in the explanation to Section 52(1) (zb) in "The Act".

S52(1)(b) provides that transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public does not constitute infringement of copyright.

S52(1) (c) provides that transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration that is not expressly prohibited by the rights holder would not be infringement of copyright, unless the person responsible is aware of infringement or has reasonable grounds for believing that such storage is of an infringing copy.

52(1) (c), is to be read with a proviso that if the owner of a copyright work, in a written complaint to the person responsible for digitally storing an infringing copy of the work, complains that such transient or incidental storage is an infringement, then the person responsible would have to refrain from facilitating access to the infringing copy of the work for a period of 21 days. If within 21 days, the person responsible does not receive an order from a competent court that directs the person responsible to refrain from providing access, then access may be resumed at the end of that period.

Infringement (S.51): means any act included in S.14 (i.e. in the copyright bundle of rights done without the permission of the copyright owner is an act of infringement, subject to the exceptions in Section 52.

Certain activities permitted by the Copyright Act for use without permission of the copyright owners in the Act, to address the issue of how to strike an appropriate balance between the authors' interest in preserving the integrity of copyright, and the public's right to enjoy the benefits of

copyrighted works in the larger interests to meet societal needs.

The exclusive rights of copyright owners are subject to certain limitations and exceptions. The limitations include the term of copyright (i.e. works fall in public domain after a certain period of time) and rights are sometimes subject to non-voluntary licenses. For example, the Act provides for compulsory licenses; the one most relevant for this discussion is Section 31A of the Act. It also provides for statutory licences, which do not require specific grant by any authority but may be enjoyed by operation of law: one that may at times be of interest to librarians is the statutory licence for cover versions under Section 31C of the Act.

The Digital Platforms are now a reality and the technologies of today and the future will provide facile and speedy access for information managers / librarians to create user friendly databases, technologies that will facilitate interoperability between diverse platforms and devices thereby establishing "inter and intra" linkages between platforms. This will be a boon for the users irrespective of the jurisdictions in which they operate. However, copyright and other IPR laws will have to be applied taking technological advances into account; as we have seen some amendments to deal with this new environment have been made, but more are likely to come into existence in future.

Further, the terms of licence may impose restrictions on copying, downloading and printing of materials accessed through electronic databases. Terms of licence may in general allow the authorized user to print a single copy of an e-book or resource for private study, scholarship or research. In some instances, it might allow the course instructor to develop a course pack using the contents of the electronic database, provided the access to the course pack is restricted to the students who are enrolled in a course.

However, the extent of copying and printing of the material is entirely dependent on the terms of the licence. For instance, many e-book archives/ databases impose restrictions on number of pages that can be printed or downloaded. In some instances, such archives have technological measures that prevent copying and printing. Encryption and user authentication systems might be required by the database provider, which may provide access and also involve copy protection technology. Libraries will have to ensure that such technological measures are not tampered in any way and impose restrictions on its authorized users to not circumvent it.

Further, librarians ought to try to familiarize themselves with the nuances of contractual obligations related to access and distribution involving digital resources. Cross-border issues may also have to be addressed.

Regardless of restrictive licensing terms that might prevent copying, printing or downloading e-books and electronic journals, it is likely that courts would be inclined to strike down such restrictive clauses on the ground that such clauses fall within the parameters of Section 52 of the Act or are against public policy, though this cannot be assured in the absence of any such judicial pronouncement as yet. Fair dealing of a copyrighted work as per Section 52 of the Copyright Act cannot be completely restricted or prevented as such a term in the licence would directly contravene the provisions of the statute and such terms may be held to be unenforceable. Delhi High Court in a recent judgement has stated that the holder of copyright is:

"not entitled in law to impose any restrictions curtailing the fair [dealing] thereof" and that "the legal action even if any taken by holder of copyright against any other person for violating the conditions illegally imposed by the holder of copyright, would thus fail." ¹⁸

Further, Section 23 of the Contract Act 1872, also states that a contract is unenforceable if the terms of the contract are "opposed to public policy" or "if permitted, it would defeat the provisions of any law". ¹⁹

Fair dealings exception are built into to the copyright legislation primarily to strike a balance between protection of copyrighted work and access to content.

Fair dealing allows limited copying of work for the purposes of research, private study, criticism or review and reporting of events.

Given that S. 52(1) allows for access to content, any restriction imposed on the library or its patrons, to use e-books and e-journals for the above purposes through contractual agreement would defeat the provisions of Section 52 of the Copyright Act and, may, therefore, be unenforceable under Section 23 of the Contract Act.

Technology Circumvention

The Act provides that if someone—

- Purposely circumvents the technological measures that are applied to copies of work, the individual may be penalized by way of imprisonment that may extend to two years and payment of a fine.

-Also, if someone alters or removes any rights management information without the proper authorization from the Management, the same would be penalized by way of imprisonment up to 2 years and would also be liable to a fine. Explanation- Digital rights management information includes means of identifying copies of a work, for instance, "watermarking" and of tracing the copying and transmission of such copies.

Therefore, information resource centers need to take appropriate care while using / uploading/reformatting/ reworking on any copyrighted works.

Technology Circumvention in the act is covered under sections 65 A & 65 B-

65 A . Protection of technological measures.—

(1) Any person who circumvents an effective technological measure applied for protecting any of the rights conferred by this Act, with the intention of infringing such rights shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) shall prevent any person from,—

(a) doing anything referred to therein for a purpose not expressly prohibited by this Act: Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or

(b) doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or

(c) conducting any lawful investigation; or

(d) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorisation of its owner; Or

(e) operator; or

(f) doing anything necessary to circumvent technological measures intended for the identification or surveillance of a user; or

(g) taking measures necessary in the interest of national security.

65B. Protection of Rights Management Information.—
Any person, who knowingly, —

(i) removes or alters any rights management information without authority, or
(ii) distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine:

Provided that if the rights management information has been tampered with in any work, the owner of copyright in such work may also avail of civil remedies provided under Chapter XII against the persons Including in such acts.

"... any original work of authorship for which a good faith prospective user cannot readily identify and/or locate the copyright owner(s) in a situation where permission from the copyright owner(s) is necessary as a matter of law." ²¹

"Orphan works" came into current discourse long after the Copyright Act, 1957 was enacted, and no subsequent amendment has addressed the question. However, dealing with orphan works is a very real problem that librarians have to face and therefore, for the time being, we have to see how far we can make use of existing provisions of the Copyright Act, none of which was actually drafted to deal with orphan works.

The problem with orphan works is that there is a genuine public interest in making them accessible to a wider readership. The only effective means of doing so is by publishing them. However, the term, "Publication" is very widely defined in Section 3 of the Act: it means making the work available whether by issuing physical copies of the work or by "communication to the public". The latter is a very wide term including every other possible means of making the work available to the public. It would cover making and issuing copies in print or any other format, a live performance, physical display, broadcasting, uploading on the internet, etc. The circumstances in which the work exists or has been in somebody's possession normally provide sufficient information. In any case if the identity of the copyright owner, or the fact of publication, becomes known to the institution, it may no longer avail itself of the exception discussed below.

The first thing to examine is whether the work is still in copyright or has fallen into the public domain. The tests are the same for all works, but the facts may be more difficult to ascertain in the case of orphan works. This is important because civil liability for copyright infringement is "strict liability": under the proviso to Section 55(1) of the Act, you are exempt from liability only if you can show that you were unaware or had no reasonable ground for believing that copyright subsisted in the work. This implies some due diligence by the librarian before treating a work as an orphan work.

We have already referred to Section 52 of the Copyright Act, which exempts a number of acts in respect of in-copyright works from liability for infringement, the library exceptions under Sections 52(1) (n), (o) and (p) being particularly relevant for our purposes. Sections 52(1) (n) and (o) apply indifferently whether the work is an orphan work or not, but Sections 52(1)(p) and 31A are (if serendipitously) relevant to orphan works.

Section 52(1)(p):

Section 52 (1) (p), ²² which deals with unpublished works kept in any library, museum or other institution to which the public has access, is useful but has two limitations. Firstly, it does not extend to all classes of copyright work: notably not to artistic works, cinematograph films and sound recordings. Secondly it does not extend to cases where the library or other relevant institution knows who the author of the work is: in other words, this exemption does not help us in the case of works which are orphan works for the reason that the author, though known, is not traceable.

Section 52(1)(p) is nevertheless useful because the works that it covers—literary, dramatic and musical—are not made subject to the "fair dealing" test of Section 52(1)(a).

Orphan works

The notion of "orphan works" as a unified concept is relatively recent: relevant legislation in some jurisdiction was enacted in the 2010s, adopting different strategies; some countries, including the U.S., have yet to formulate their legislation.

A compendious definition is provided by the U.S. Copyright Office:

The library may facilitate the complete reproduction of the work for private use and research. However, the library may be faced with the problem of making a valuable asset in its possession available to someone for private publication, for-profit: the law does not forbid it. So far as digital communication to the public is concerned a good strategy might be for the library to simply publish the work on its website first. However, the library should devise a transparent policy regarding the grant of permission to publish such a work in print format.

The law does not state the consequences if the author appears. In such a case, the publication would have been made lawfully and the author would have no remedy for the past; but he/she might succeed in restraining further publication or demand a license fee (which would be prospective)

Unpublished Work

Section 52 (1) (p) of the Act-

(p) 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;

Section 31A:

Unlike Section 52(1)(p), Section 31A applies to all classes of work: artistic works, the orphan- work films, and sound recordings can be published by recourse to Section 31A though not under Section 52(1)(p). But Section 31A, again, is somewhat problematic, particularly in the case of films and sound recordings, not having been drafted with orphan works in mind.

Section 31A applies to works which, whether already published or not, are "withheld from the public in India, the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found...". In effect this provision comes into play in all cases where the work is still in copyright but is being withheld from the public in India whether deliberately or by omission. (Whether the author is dead is hardly pertinent for us: the work might still be in copyright and the current copyright owner might still be unknown or untraceable.)

The High Court [now replacing the Intellectual Property Appellate Board (IPAB) after the Ordinance of 4 April 2021] ²³ may grant a compulsory licence to publish any work under Section 31A, on application, after following a prescribed

procedure and subject to certain conditions, the most important condition being the payment of royalty at rates fixed by the Court. Royalty, as fixed by the Appropriate Court [now replacing the Intellectual Property Appellate Board (IPAB) after the Ordinance of 4 April 2021], will have to be paid to the copyright owner if and when he/she is discovered or decides to reveal himself/herself. The Copyright Rules do not provide the Appropriate Court [now replacing the Intellectual Property Appellate Board (IPAB) after the Ordinance of 4 April 2021] with any guidance as to the basis on which licence fees should be fixed under Section 31A.

Libraries could reduce their expenses by applying for compulsory licenses limited to online publications seeking fixation of the licence fee on that basis. The work would thus have been made available to the public and would no longer fall within the scope of Section 31A.

But further, neither the Act nor the Rules prescribe anything about the custody of the licence fee; specific orders would need to be obtained from the Appropriate Court [now replacing the Intellectual Property Appellate Board (IPAB) after the Ordinance of 4 April 2021] (to fix the fee prospectively after the author becomes known, if possible) or the library would have to devise some mechanism, like a fund, to address the contingency that the copyright owner reveals himself.

"The Act" deals with orphan works under section 31 A through compulsory licensing of unpublished work. Section 31A. Compulsory licence in unpublished or published works. —

(1) Where, in the case of any unpublished work or any work published or communicated to the public and the work is withheld from the public in India, the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found, any person may apply to the Appellate Board for a licence to publish or communicate to the public such work or a translation thereof in any language.

(2) Before making an application under sub- section (1), the applicant shall publish his proposal in one issue of a daily newspaper in the English language having circulation in the major part of the country and where the application is for the publication of a translation in any language, also in one issue of any daily newspaper in that language.

(3) Every such application shall be made in such form as may be prescribed and shall be accompanied with a copy of the advertisement issued under sub-section (2) and such fee as may be prescribed.

(4) Where an application is made to the Appellate Board under this section, it may, after holding such inquiry as may be prescribed, direct the Registrar of Copyrights to grant to the applicant a licence to publish the work or a translation thereof in the language mentioned in the application subject to the payment of such royalty and subject to such other terms and conditions as the Appellate Board may determine, and thereupon the Registrar of Copyrights shall grant the licence to the applicant in accordance with the direction of the Appellate Board.

(5) Where a licence is granted under this section, the Registrar of Copyrights may, by order, direct the applicant to deposit the amount of the royalty determined by the Appellate Board in the public account of India or in any other account specified by the Appellate Board so as to enable the owner of the copyright or, as the case may be, his heirs, executors or the legal representatives to claim such royalty at any time.

(6) Without prejudice to the foregoing provisions of this section, in the case of a work referred to in sub-section (1), if the original author is dead, the Central Government may, if it considers that the publication of the work is desirable in the national interest, require the heirs, executors or legal representatives of the author to publish such work within such period as may be specified by it.

(7) Where any work is not published within the period specified by the Central Government under sub-section (6), the Appellate Board may, on an application made by any person for permission to publish the work and after hearing the parties concerned, permit such publication on payment of such royalty as the Appellate Board may, in the circumstances of such case, determine in the prescribed manner.

Since section 31 A (1) uses the phrase “unknown or cannot be traced,” one can apply for compulsory licensing for orphan works.

We have already referred to Section 52 of the Copyright Act, which exempts a number of acts in respect of in-copyright works from liability for infringement, the library exceptions under Sections 52(1) (n), (o) and (p) being particularly relevant for our purposes. Sections 52(1) (n) and (o) apply indifferently whether the work is an orphan work or not, but Sections 52(1) (p) and 31 A are (if serendipitously) relevant to orphan works.

Underlying works:

By “underlying works” we mean works incorporated in a film or sound recording that would also be capable of independent exploitation. In the case of both sound recordings and films these would include recorded vocal and instrumental music and words accompanying vocal music. The screenplay (script), choreographic works, etc. would also be among the possible underlying works in the case of a film. Since underlying works are authored by natural persons, copyright subsists in them until the expiration of sixty years from the commencement of the year following the year of the author's death, whereas the term of copyright in films and sound recordings is sixty years from the date of publication. Hence the film is almost certain to fall into the public domain before expiration of the term of copyright in all the underlying works.

The authors (i.e. producers) of films and sound recordings are usually identifiable, but they might be orphan works if the

present copyright owner cannot be found (e.g. if the producer company was liquidated). In the case of films that have fallen into the public domain, the rights of the authors of underlying works are limited to the extent that under Section 52(1)(y) the “exhibition” of a film that has itself fallen into the public domain is not an infringement.

The term “exhibition” is not defined but it may be taken to be projection or playing of the film that is not private, i.e., is not confined to a limited circle of family and friends. Private exhibition is never infringing, and as far as copying is concerned, copying for private use, research etc. is permitted subject to “fair dealing” under Section 52(1)(a). It is suggested that in the case of a film “fair dealing” may cover reproduction of the entire film assuming bona fide use for the purposes of private use, research etc.

Performers' rights:

Performers' rights are relevant in the case of films and sound recordings.

If the film or sound recording was published after 10.05.1995, being the date on which the Copyright (Amendment) Act, 1994, came into force, the performers of recorded instrumental and vocal music enjoy performers' rights; in the case of the film the actors also enjoy such rights. Performers' rights do not subsist in films or sound recordings made before that date.

Performers' rights in sound recordings as initially introduced comprised the right of recording the performance: the performer had the exclusive right to allow his/her performance to be recorded either generally or for any particular purpose; however, once the performer had permitted his/her performance to be included in a film, he/she had no further right to object to the exploitation of the film. These are the rights that performers enjoy in films and sound recordings created between 10.05.1995 and 20.12.2012.

The rights of performers were widened considerably by the amending Act of 2012, which came into effect on 21.06.2012.

Since that date, the performer has concurrently the same rights in the sound recording or film as the producer, namely, to reproduce and issue copies of the film or sound recording to the public; communicate the performance to the public; or sell or give on commercial rental or offer it to the public for the said purposes.

In addition, the performer has a specifically enumerated right against the broadcast of the performance without his or her permission. The performer whose performance is incorporated in a film cannot object to the exploitation of the film; but now he/she would still have a royalty right: the rate would be subject to negotiation or the right would be waived.

Section 39 provides that the exceptions in Section 52 including Section 52(1)(p), will apply mutatis mutandis to performers' rights. However, this is not the case with a compulsory licence under Section 31A (which we shall deal with below).

It is, further, pertinent to note that the term of the performers right may sometimes exceed the term of copyright in the sound recording or film, as may happen in the case of the authors of underlying works, the term of performers' rights also being fifty years from the commencement of the year following the year of the death of the performer.

However, Section 52(1)(p) can still be applied to such performances until they fall into the public domain. Further, it is a reasonable interpretation of the law that a compulsory licence under Section 31A applies to the performances recorded in a film or sound recording: Section 31A would otherwise, be meaningless. Further, in the case of films, we may also note that the exception in Section 52(1)(y), discussed above, regarding the exhibition of the film, would also apply to performances.

This exception applies to any kind of institution, be it a library (whether non- commercial or not), a museum, an educational institution or anything of the kind. The exception maybe availed of by any person, not only by the institution itself; though it does not of itself create a right of access to the institution's collection.

What is excepted from copyright liability is a reproduction (even of the whole work) "for research or private study" or "with a view to publication". The orphan work exception does not come into play where the institution knows the identity of the author(s) and the work has yet to fall into the public domain.

Making works available in a format accessible to persons with disabilities

The Copyright (Amendment) Act, 2012 incorporated Section 52(1)(zb) with objective of implementing the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. Section 52(1)(zb) allows any person or any organization to adapt, reproduce, or communicate any work in any accessible format to facilitate persons with disabilities to use the work for personal use, educational or research purposes. Persons with disabilities includes not only visually challenged persons, but also other print-handicapped persons.

Section 52(1)(zb) enables any person, including libraries, to provide works in an accessible format to persons with disabilities if such access is made available on a non-profit basis. Any fee charged to make works available in accessible formats should be towards recovering the cost of production.

Further, any organization that is making the works available in accessible formats to persons with disabilities will have to ensure that such copies are not available or circulated to others through ordinary channels of business.

Any organization that is making works available in accessible format to persons with disabilities includes an organization registered under Section 12A of the Income-Tax Act, 1961 and working for the benefit of persons with disabilities or recognized under Chapter X of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 or receiving grants from the Government for facilitating access to persons with disabilities or an educational institution or library or archives recognized by the Government.

Template for making work accessible to disabled persons

Declaration by any organization working for the benefit of Persons with Disabilities seeking to make a work in a format accessible to persons with disabilities.

The Copyright Act, 1957 governs the adaptation, reproduction, issue of copies, or communicate to the public of any work in an accessible format by any person to facilitate persons with disabilities to access works.

The (name of the institution working for the benefit of persons with disabilities), hereby declares that:

(title of the work) published by (name of the publisher and year of publication) has been made available in an accessible format (specify the format) to (name of the disabled person) with disabilities (type of disability) for private or personal use, educational purposes only. The above-said work has been transformed to the accessible format (specify the format) and would be made available to persons with disabilities only.

Access to persons with disabilities is being provided on a not-for-profit basis and the only cost of production is being recovered.

The accessible format will not be made available to users who are not authorized to receive content. That the content transformed into an accessible format will not be stored in multiple devices except for the limited purposes of creating a backup on servers. That all reasonable measures have been employed by the organization to ensure such accessible formats (specify the format) are not in ordinary channels of circulation.

Signature

Date

Display Publicising a library's collection

There should not be any objection to displaying the jackets, bibliographical details and the like in the premises of the institution, or by uploading the same on any index or as particulars of new acquisitions onto the institution's website or in leaflets for members. There should likewise be no objection to very brief abstracts prepared in the institution itself being put up either in the library premises or on its website. The purpose is merely to point the reader to the work; thus, for example, hyperlinking even to a third-party website is permissible, but not deep-linking or framing.

Section 52 (1) (zb), the adaptation, reproduction, issue of copies or communication to the public of any work in an accessible format, by—

(i) any person to facilitate persons with disabilities to access to works including sharing with any person with disability of such accessible format for private or personal use, educational purpose or research; or

(ii) any organization working for the benefit of the persons with disabilities in case the normal format prevents the enjoyment of such works by such Persons:

Provided that the copies of the works in such the accessible format is made available to the persons with disabilities on a non-profit basis but to recover only the cost of production:

Provided further that the organization shall ensure that the copies of works in such accessible format are used only by persons with disabilities and takes reasonable steps to prevent its entry into ordinary channels of business.

Compulsory Licence

The High Court [now replacing the Intellectual Property Appellate Board (IPAB) after the Ordinance of 4 April 2021] may, on application following the procedure laid down, grant a compulsory licence to publish a work if the work has been withheld from the public in India or if the author is dead or unknown or cannot be traced or the owner of copyright in the work cannot be found. This is the only provision in the Act whereby orphan works that are not literary, dramatic or

Educational Exceptions

Librarians can be involved in the exercise of the "educational exceptions" by educational institutions, particularly Section 52(1)(i). This exception allows "... the reproduction of any Work—

- (i) by a teacher or a pupil in the course of instruction, or
- (ii) as part of the questions to be answered in an examination; or
- (iii) in answers to such questions." ²⁴

The term "in the course of instruction", ²⁵ has been interpreted very liberally by the Delhi High Court *The Chancellor, Masters and Scholars of Oxford University v Rameshwari Photocopy Services & Ors.*²⁶ The issue was whether the prior preparation of course packs comprising different chapters from different academic works, photocopied and spiral bound, for the use of students as background reading for interactive classes amounted to the reproduction of a work "in the course of instruction" and the High Court, both at the trial and appellate levels, answered the question affirmatively.

A library or other institution which is not conducting instructional activities would be on safe ground in making extracts from works in its collection available for copying strictly for Section 52(1)(i). The extracts should be relevant to the subject of the course pack and in no case should the whole book (however short) be copied.

Educational Exceptions -

Section 52 (1)(i) states the reproduction of any work—

- (i) by a teacher or a pupil in the course of instruction; or
- (ii) as part of the question to be answered in an examination; or
- (iii) in answers to such questions; are exempted from copyright infringement.

This was reiterated in the Delhi High Court case *The Chancellor, Masters and Scholars of Oxford University v Rameshwari Photocopy Services & Ors.* The Court held that -

In the context of teaching and use of copyrighted material, the fairness in the use can be determined on the touchstone of 'extent justified by the purpose'. In other words, the utilization of the copyrighted work would be a fair use to the extent justified for purpose of education. It would have no concern with the extent of the material used, both qualitative or quantitative. The reason being, 'to utilize' means to make or render useful. To put it differently, so much of the copyrighted work can be fairly used which is necessary to effectuate the purpose of the use i.e. make the learner understand what is intended to be understood.

The Court's reiterate section 52 (1) (i) and held that reproduction of work as part of 'course of instruction' and also as part of a question or even an answer is permissible and are exempted from copyright infringement.

There should not be any objection to displaying the jackets, bibliographical details and the like in the premises of the institution, or by uploading the same on any index or as particulars of new acquisitions onto the institution's website or in leaflets for members. There should likewise be no objection to very brief abstracts prepared in the institution itself being put up either in the library premises or on its website. The purpose is merely to point the reader to the work; thus, for example, hyperlinking even to a third-party website is permissible, but not deep-linking or framing.

Publicising the collection

Uploading a copyrighted work without the copyright owner's licence would be infringing, the library can only publicise the availability of such a work either in its collection or on third-party websites in the manner discussed above.

Users' Rights

Under Section 51(1)(a) anyone—which includes anyone using any library, whether a non-commercial public library or not—may reproduce any kind of work for private and personal use including research, or for criticism and review of that work or of any other work, or for reporting current events.

This is not carte blanche for free or unlimited copying: it is subject strictly to “fair dealing”. Fair dealing means, essentially, copying as much as is necessary for the purpose but no more.

There can be no hard-and-fast rule, but the underlying principle is the honesty of purpose: to take an extreme case, copying the whole work is generally incompatible with fair dealing. Copying for the purpose of research may require larger extracts than may be quoted in a work based on such research. Again, to the extent that the point can be made effectively without extracts in a piece of criticism and review, extracts should not be used.

Fair dealing in the case of reporting current events is particularly restricted: if an event can be reported without extracts from any in-copyright work (e.g. in reporting the death of an author or performer, or writing an obituary, the use of extended extracts of the author's work are not permissible.) By honesty of purpose we mean that the person making the reproduction is not trying, so to speak, to ride on the coat-tails of the author, and does not intend to appropriate the extract copied for its own expressive value, even with due attribution: rather he should merely copy for his own use in preparing his own literary, artistic, or another expression. Finally, we must add that there can be no hard-and-fast rule as to the scope of “fair dealing”: the term has to be seen as explaining itself in the facts of a particular case.²⁷

A library needs to facilitate fair dealing reproduction for the above purposes, this being very consistent with the library's raison d'être, yet avoid liability for “secondary infringement” or for “authorizing” infringement.²⁸ It is impossible to monitor the scale or nature of copying, but it would be prudent for the library to acquaint users with this principle, and obtain signed undertakings with warranties and indemnities, which should also cover moral rights.

Declaration by User

Users and Patrons admitted to libraries are seldom asked to sign on copyright declarations framed within the legislative exception on private use and research. There isn't any standard form used in libraries not falling within any institutional framework i.e. schools, colleges, universities use forms merely to identify and verify details of patrons. Libraries falling within any institutional framework may end up using forms that do not necessarily follow the overall ethos of private use and research.

Template of Declaration

I....MR/MS..... declare that following pages/chapter from (title of the copyrighted work) published by (name of the publisher) have been photocopied and that copy :
I will not use the copy except for research or private study.

To the best of my knowledge no other person with whom I work or study has made similar request for substantially the same content.

I will not distribute a copy of it to any other person and will not make multiple copies of the same.

I have not previously been supplied with a copy of the same material by you or any other librarian.

I understand that if the declaration is false with regard to the copy supplied to me by the abovesaid library, that it will be an infringing copy and I shall be liable for infringement of the copyright.

Signature

Date

Institutional publications/theses and dissertations/working papers

The author of a thesis or dissertation, or the author(s) of a working paper, are the first owners of copyright. The library might be the first owner of copyright in the case of working papers that are made by regular employees (but not outsourced work).

If these are unpublished works, copyright in them subsists until they are published and, thereafter, for the normal term of copyright. They can be published without the author's permission only where one of library exceptions applies. The library is however entitled to make inventories of such unpublished works. As already mentioned, the person who makes a speech or lecture is the first owner of copyright, even if the speech or lecture is read out by another person.

Government publications/ datasets

Copyright in Government publications vests in the Government for sixty years from the date of publication. Government publications not yet in the public domain are however subject to the exceptions provided for in Section 52, including library exceptions.

So far as datasets/databases are concerned, copyright subsists only in the selection and arrangement of their content if the same is distinctive¹ and not in any facts themselves. Works included in a database are subject to copyright law.

The discussion of unpublished works hereinabove would also apply to unpublished Government works except that access to Government works held in Central Government archives is governed by the Public Records Act and, therefore, it is that Act rather than the Copyright Act that should first be referred to in regard to such archives. The same applies to any legislation governing State Archives.

Concluding Remarks

The nuances of the Indian Copyright Act 1957 (as amended in 2012) immensely influence operations related to libraries/information centers. This guide lights the path of Information Managers / Librarians while servicing the users of their facilities. However, for specific contextual issues that might be subject to the interpretation of the provisions of The Act, it is advisable to seek professional inputs from copyright experts. It ought to be appreciated that case laws in copyright-related matters have evolved and are evolving with the introduction of new technologies, especially in Digital Technologies and Artificial Intelligence.

GLOSSARY

NB: This glossary is intended only to be of general assistance to librarians for quick reference; the definitions should not be relied upon as legal advice.

Adaptation: A work created by adapting a pre-existing work to a different class of work, or a different genre or a different use, e.g. a translation; a film made out of a play; a film or a play made in respect of a novel; a graphic novel made out of a literary work; a new arrangement of a musical work, etc.

Artistic work: Besides traditional forms such as paintings, sculptures, engravings, etc., this term also includes engineering drawings, maps, and the like; photographs; and architectural works. Artistic works must be original, but merit is irrelevant. In the case of architectural works, however, the structure must have some artistic character or design.

Assignment: Transfer in writing of title in a copyrighted work, which maybe for the whole bundle of rights for the term of copyright or limited to some rights, or for a limited period short of the term of copyright, or for a limited geographical area: These parameters must be specified in the agreement. Consideration for an assignment is commonly by way of a lump-sum payment and/ or the payment of royalty at agreed rates.

Author: The person who creates the work. In India and generally in common law jurisdictions, an author may be either a natural or a juridical person (i.e. a company or other corporate entity that can sue or be sued). In civil law jurisdictions, generally speaking, only natural persons can be authors. Mainly, for this reason, the Berne Convention and subsequent copyright treaties do not define the term "author" but leave the definition to national legislation.

Berne Convention: The principal multilateral treaty on copyright. Its basic principles are national treatment and minimum standards of copyright protection. Reciprocity is applied rather than national treatment in a few cases, the important one being the term of copyright.

Beijing Treaty on Audiovisual Performances, 2012: This treaty binds its member States to protect audiovisual performance on the same basis as aural performances. India has acceded to this treaty: in fact, Indian law was already compliant with the same.

Berne Union: The Berne Convention as originally signed in 1886 has been succeeded by various "Acts" (1908, 1928, 1948, 1967 and 1971) each of which is a self-contained treaty. The contracting States collectively form the "Berne Union", wherein a State that may not have acceded to the latest Act remains a member of the Union bound reciprocally with the other member States only by the previous Act which it has acceded to.

Book: A book is not per se a work but commonly comprises bound sheets of paper—or any other format, like an e-book or, in former times, a scroll—on which two-dimensional works, e.g. literary works, artistic works, musical notation, etc. are fixed.

Broadcast: Communication to the public using electronic waves by a broadcasting organization in accordance with its broadcasting licence in terms of mode of

broadcast, wavelength, territory etc. This is one of different kinds of communication to the public and, in India, does not extend to the internet.

Broadcast Reproduction Right: The related right/ neighbouring right enjoyed by broadcasting organisations over their signals, to prevent piracy thereof. This right is distinct from any copyright subsisting in the content that is broadcast.

Cinematograph film: A work of visual recording, including the soundtrack. "Audiovisual work" is a synonym. The authorship of cinematograph films varies in different jurisdictions. In India as in most common law jurisdictions, the author of a film is the producer, being the person who takes the initiative and responsibility for the creation of the film. Elsewhere films have multiple authorship usually with some provision ensuring that the producer can exploit the film without hindrance.

Civil law: In copyright parlance, this term refers to all legal systems that are not based on common law.

Common law: A body of law that has been developed over the centuries by treating previous judicial decisions as binding law. Generally speaking this principle (technically called *stare decisis*) applies in the UK and in all countries that were ever under British rule in the past, including the United States. All other countries are generally referred to as "civil law" countries. It is important to note that legislation always overrides the common law.

Compulsory licence: A licence granted by an authority (in India the High Court, though until recently it was Intellectual Property Appellate Board) without the author's consent, on the application of a third party. Examples in India include instances where a published work is now being withheld from the public, or where the author cannot be traced, etc.

Compilation: Compilations of data whether manual or digital, including machine-readable form, are protected by copyright only to the extent that they constitute "intellectual creation". This protection does not extend to contents of the database that are not protected by copyright. Further, it is without prejudice to the copyright that may subsist in any of the contents of the database.

Contract for service: Any agreement to provide services by a person who is not an employee but an independent contractor, e.g. an outsourcing agreement.

Contract of service: An employment agreement.

Copyright: The bundle of exclusive rights granted to authors by law; copyright subsists only in original works and not in other subject matter and is strictly a statutory right, i.e. it subsists by virtue only of legislation and not otherwise. In India, copyright subsists in original literary, dramatic, musical and artistic works and in cinematograph films and sound recordings.

Copyright owner: In most cases the author or any subsequent assignee of work; and in all cases the authors of literary, dramatic, musical, or artistic works included in a cinematograph film. Further, in the case of a photograph, painting, portrait, engraving or cinematograph film commissioned for valuable consideration, or of a work made under a contract of service or of apprenticeship, the employer is the first owner of the copyright. An exclusive licensee is also a copyright owner to seek legal remedies. It may be noted that in the case of Government works the first owner of the

copyright is the Government. The same principle applies to works created for public sector organizations and generally to international organizations that India is a member of.

Copyright society: An organisation authorised by the Government to administer the licensing rights of its copyright owning members in respect of any particular class of work. A copyright society is the only body that can issue licences without being the owner or exclusive licensee of the works licensed. Internationally, the term "collecting society" is more common.

Cover version: The recorded performance of a published musical work (or possibly a literary or dramatic work) published under statutory licence subject to compliance with certain conditions, notably the payment of royalty to the copyright owner at prescribed rates. It is important to note that this statutory licence is against the copyright owner of the recorded musical etc. work and does not concern the copyright owner of the sound recording.

Derivative work: A general term (not occurring in the Copyright Act) for any work that owes its existence to the prior existence of another work; it includes all adaptations but is a wider term also including for example the "remake" "prequel" or "sequel" of a film; the reuse of a character from a pre-existing literary or dramatic work or film, etc.

Economic rights: The rights of the copyright owner to exploit the work, as distinct from moral rights. In India and other common law jurisdictions, the term "copyright" is applied only to economic rights.

Exclusive licence: A transfer in writing of specified rights for any specified period (within the term of copyright) for any specified geographical area whereby the transferred rights vest exclusively in the licensee, excluding even the licensor himself. To be distinguished from non-exclusive licences, which can be granted simultaneously to more than one licensee.

Exhaustion: The principle that copyright subsists only in the first sale of a work (e.g. it would not apply to second-hand copies). It does not apply to the exploitation of computer programs, films, and sound recordings.

Exploitation: The legitimate exercise of copyright for profit (mainly by licensing or by assignment).

Fair use and fair dealing: These terms are often used interchangeably, though they do not mean quite the same thing. "Fair use" is a broad U.S. term covering all exceptions in general terms, depending on nature, extent, purpose and the commercial effect of any use of a copyrighted work on the facts of the case. "Fair dealing" in India and other common law jurisdictions generally is a precondition for the exercise of the exceptions of personal use, research, criticism, and news reporting, meaning reasonable use of the work according to the actual requirement. The term is also sometimes used loosely for all the copyright exceptions enumerated in the statute.

Fixation: The embodiment of work in some physical format, e.g. a literary work in a book, a musical work in either a sound recording or in musical notation, etc. Fixation is a condition for the subsistence of copyright generally in common law

countries except for India. The Berne Convention leaves the matter to national law.

Government work: A work created for the Government.

Idea-expression dichotomy: This is one of the most fundamental principles in copyright law: copyright protects the expression of ideas or concepts, but not the ideas themselves. Ideas thus remain in the public domain, preserving freedom of expression, while copyright subsists in their expression as embodied in a work. There can be no comprehensive definition of either an idea or an expression or any "bright line" distinction between the two: in some cases, the distinction is difficult to make and becomes the subject of litigation. The TRIPS Agreement specifies that copyright protection "shall extend to expressions but not to ideas, procedures, methods of operation or mathematical expressions as such."

Indian work: A literary, dramatic, or musical work of which the author is an Indian citizen, or which is first published in India, or in the case of an unpublished work, where the author was a citizen of India when the work was created. However, it may be noted that the term "Indian work" has a specialised sense and that, in accordance with its international treaty obligations, broadly the same principles apply to all works.

Infringement: The doing of any act that requires the copyright owner's licence, without such licence; also, knowingly and for profit permitting the use of any place for infringement. **Intermediary:** An intermediary is a person who receives, stores or transmits electronic data and makes it available or provides services regarding it to third parties.

Intermediary: An intermediary is a person who receives, stores or transmits electronic data and makes it available or provides services in regard to it to third parties.

Intermediary liability: The vexed question of the liability of intermediaries for copyright infringement or infringement of other rights. The question is too complex for elaboration here.

Limitations and Exceptions: The balance between the interests of users and copyright owners is maintained by limiting the scope of copyright. The scope of copyright is limited by the fact that copyright subsists only for a limited term; that it does not subsist in ideas (and thus does not interfere with freedom of expression); that it may be subject to non-voluntary licensing; that it does not extend to certain activities like the private performance of works. Exceptions, on the other hand, do not limit the scope of copyright per se but comprise specific acts which are exempt from liability for infringement but would otherwise be infringing; these include the reproduction, subject to "fair dealing", of a work for private use, research or criticism, or for news reporting; certain exceptions for educational purposes; for certain acts done on educational premises; or for various other purposes such as reporting judicial decisions.

Making available: When used independently this term generally means making a work available for the public to enjoy at times and places of their choice, the main instance being uploading the work on the internet.

Marrakesh Treaty, 2013. An international treaty under which contracting States are obliged to provide for the needs of persons with visual or other impairments. India is a party to this treaty and its Copyright Act provides a suitable exception.

Moral rights: Certain rights, referred to in Indian law as

“author’s special rights”, that are personal to the author and (unlike economic rights) cannot be transferred. The two principal moral rights mandated by the relevant international treaties and incorporated in Indian law are the right of paternity (i.e., attribution of the work to the author) and the right of integrity (i.e. the right to seek remedies against mutilations, distortions etc. of the work that are injurious to the author’s honour and reputation). In some countries, including India, moral rights are perpetual and can be enforced by the author’s heirs or legal representatives. It may be noted that performers also now enjoy moral rights, because of the risk of digital manipulation.

National Treatment: The principle enshrined in the Berne Convention and other international treaties that each contracting State shall protect works originating in other member states in accordance with its own laws. It may be noted that this principle does not apply to the definition of “author”. Further, the principle of reciprocity, rather than national treatment, applies in certain cases, notably in regard to the term of copyright: no contracting State is obliged to protect a work originating in another contracting State beyond the term of copyright in such other contracting state, e.g. a country where the term of copyright is 70 years need protect Indian works only for 60 years, the latter being the term of copyright in India.

Non-voluntary licence: A licence that does not require the copyright owner’s consent. It can be a compulsory licence, which is granted on application by a competent authority on terms fixed by such authority, or a statutory licence granted directly by operation of law, which any person can avail himself of subject to conditions laid down by the statute.

Original: Copyright subsists in original works; however, originality in copyright law does not imply novelty or merit; it means only that the work originates from the author without having been reproduced from another work, and that the author has applied at least a minimal degree of labour, skill and mental effort.

Orphan works: Works that are still in copyright, but the copyright owner cannot be traced.

Performer: In India the definition covers performers both of works (literary and dramatic works, including lectures) and other performers; and also covers performers of audio-visual works. Internationally, protection for audiovisual performers has been introduced by the Beijing Treaty which several countries have acceded to; however many countries do not as yet protect audiovisual performances.

Phonogram: The term for sound recording that is used in the relevant international treaties.

Phonograms Convention: An international convention of 1971 protecting the producers of phonograms from the duplication or importation of their phonograms in other contracting States, including India.

Piracy: This is not a term of law but is commonly used for the production of exact copies of a work on a commercial scale for infringing exploitation.

Publication: Under Indian law, the act of making a work available to the public either by issuing copies to the public or by communication to the public.

Public domain: The body of works that is not protected by copyright as the term has expired or because they were

created, or the author had died, before the law of copyright existed, or for any other reason.

Related rights, also known internationally as neighbouring rights are rights that subsist not in works but other subject matter and, hence, are not deemed to be created by authors. The neighbouring rights required by the international treaty system, to which India conforms, are the rights of producers of phonograms, of broadcast in organisations, and of performers.

Reprography: Copying and reproducing documents. In India the term is usually applied to physical reprography by photocopying.

Rights management information: Digital watermarks or other digital information stored in digital copies of a work to identify or trace the use of the copy.

Rome Convention, 1961: This Convention dealt with neighbouring rights. India did not accede to it until 2018. In view of India’s accession to the TRIPS Agreement, and thereafter to the WIPO Performers and Phonograms Treaty (WPPT) it is of little practical significance.

Sound recording: A recording of sounds made by any means on any medium. Sound recordings are protected by copyright in India and generally in common law jurisdictions but, elsewhere, and in the international treaty system, are protected by a related/ neighbouring right.

Statutory licence: A licence granted by operation of law, subject to statutory conditions but not requiring any specific grant of licence by any authority. The statutory licence for cover versions is an example.

Technological measures: Inbuilt software features of a work or website limiting access to and/ or use of the work. Subject to certain exceptions analogous to fair dealing, the circumvention of technological measures is a criminal offence in India.

Three-step test: All members of the World Trade Organisation are obliged under the TRIPS Agreement to confine the scope of all limitations and exceptions in their copyright laws to special cases that do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the copyright owner. This is an expansion of the corresponding provision in the Berne Convention that applies only to the right of reproduction.

TRIPS Agreement (or “TRIPS”): The commonly used acronym for the Agreement on Trade-Related Intellectual Property Rights which is one of the agreements acceded to by all members of the World Trade Organisation (WTO) i.e. by most countries in the world, India included. This Agreement does not apply to moral rights but incorporates all the other provisions of the Berne Convention, adding further provisions thereto, hence it is described as “Berne Plus”.

Universal Copyright Convention, 1952 (UCC): This Convention, which is administered by the United Nations Educational and Cultural Organisation (UNESCO) was created for certain countries (including the U.S. and the then U.S.S.R) which did not accept the terms of the Berne Convention, particularly regarding registration or other formalities for the enjoyment of copyright and the term of copyright. Since these two major countries, with others, have since acceded to the Berne Convention and in any case are bound by TRIPS, UCC is

no longer of much significance.

WIPO Copyright Treaty, 1996: An international treaty that updates the Berne Convention to deal with digital matters. Its most important additions to the existing regime are the protection of Technological Measures and of Rights Management Information. India has acceded to this treaty.

WIPO Performances and Phonograms Treaty, 1996: An international treaty that updates the international neighbouring rights regime to deal with digital matters, but also standardising the scope of neighbouring rights in performances and sound recordings. It provides for the protection of Technological Measures and of Rights Management Information. India has acceded to this treaty.

Work: Works are the subject matter in which copyright subsists. They are distinguishable from the subject matter of related/neighbouring rights because they are created by authors. Performers and broadcasting organisations, for example, are not authors. It may be noted that the Berne Convention and, where relevant, subsequent treaties, include cinematograph films among works. The requirement under the Berne Convention and all subsequent treaties is broad, being an open list intended to cover all possible works; India and most common law countries (with the notable exception of the U.S.) have closed lists enumerating literary, dramatic, musical and artistic works, works of artistic craftsmanship etc. But such terms are usually defined broadly enough to meet treaty requirements.

Work for hire: An American term best avoided in India as it makes no clear distinction between contracts of service and contracts for service as in Indian law.

World Intellectual Property Organisation (WIPO): The United Nations organisation, based in Geneva, that deals with all forms of intellectual property. Except for TRIPS and UCC it administers all international treaties pertaining to copyright and neighbouring rights.

END NOTES

1. The Copyright Act, 1957 (14 of 1957); The Copyright(Amendment)Act,2012 (No. 27 of 2012) (An Act further to amend the Copyright Act, 1957); Copyright Rules, 1958; The Copyright Rules, 2013; The Copyright (Amendment) Rules, 2016
2. The Copyright(Amendment)Act,2012 (No. 27 of 2012): Sections 22
3. The Copyright Rules, 2013: Chapter XIII, Registration of Copyright
4. The Copyright Act, 1957 (14 of 1957): Section 62
5. The Copyright Act, 1957 (14 of 1957); Section 57
6. Amar Nath Sehgal v Union of India 2005 (30) PTC 253 (Del)
7. Ritika Private Limited v Biba Apparels Private Limited [DHC CS(OS) No. 182/2011 (2016)]
8. Works Made for Hire & It ; <https://www.copyright.gov/circs/circ30.pdf>> (last visited on 4 th July 2020)
9. Summaries of Conventions, Treaties and Agreements Administered by WIPO <[https:// www.wipo.int/edocs/pubdocs/en/intproperty/442/ wipo_pub_442.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/442/wipo_pub_442.pdf)> (last visited on 4 th July 2020)
10. Berne Notification No. 108, Berne Convention for the Protection of Literary and Artistic Works: Declaration by the Republic of India Extending the Effects of its Ratification of the Paris Act (1971) to Articles 1 to 21 and the Appendix <[https://www. wipo.int/treaties/en/notifications/berne/treaty_berne_108.html](https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_108.html)> (last visited 2nd July 2020)
11. The Copyright Act, 1957 (14 of 1957): Section 52(1)(n) and 52(1)(o)
12. Official archives also meet the definition of a non-commercial public library. However, access to their contents are governed by special laws. See Ujjwala Uppaluri, 'The Libraries Exception: What the Amended Copyright Act Does (and Should Do) for Preserving and Sharing Knowledge in the Digital Era' 5 NUJS L. Rev. 665 (2012).
13. The Copyright Act, 1957 (14 of 1957): Section 52(1)(o)
14. The Copyright(Amendment)Act,2012 (No. 27 of 2012)(An Act further to amend the Copyright Act, 1957); The Information Technology Act, 2000 (No. 21 of 2000) ; The Information Technology (Amendment) Act, 2008 (No. 9 of 2009)
15. RFA(OS) 81/2016, Delhi High Court
16. Ames S. Heller, Paul Hellyer & Benjamin J. Keele, Librarian's Copyright Companion (William S. Hein and Co., 2012).
17. The Copyright(Amendment)Act, 2012 (No. 27 of 2012)(An Act further to amend the Copyright Act, 1957)
18. The Copyright(Amendment)Act, 2012 (No. 27 of 2012)(An Act further to amend the Copyright Act, 1957): Section 65A
19. Tekla Corporation & Anr v. Survo Ghosh & Anr. AIR 2014 Del 184
20. See Ujjwala Uppaluri, 'The Libraries Exception: What the Amended Copyright Act Does (and Should Do) for Preserving and Sharing Knowledge in the Digital Era' 5 NUJS L. Rev. 665 (2012).
21. Orphan Works and Mass Digitization: A Report of the Register of Copyrights <[https://www. copyright.gov/orphan/reports/orphan-works2015.pdf](https://www.copyright.gov/orphan/reports/orphan-works2015.pdf)> (last visited 15th May 2020)
22. The Copyright Act, 1957 (14 of 1957): Section 52(1)(p)
23. Intellectual Property Appellate Board: Government of India <[https : / / w w w. ipab.gov.in/index.php](https://www.ipab.gov.in/index.php)> (last visited 14th May 2020)
24. CS(OS) 2439/2012) 16 Sep 2016, Delhi High Court
25. CS(OS) 2439/2012) 16 Sep 2016, Delhi High Court
26. CS(OS) 2439/2012) 16 Sep 2016, Delhi High Court
27. Hubbard v. Vosper (1972) 1 All ER 1023 p. 1027, 471 U.S. 539985).
28. Associated Newspapers v News Group Newspapers, [1986] RPC 515.
29. British Broadcasting Corporation v British Satellite Broadcasting Ltd. (1991) 3 All ER 833

