

# The Library Exception : Fair Dealing for Libraries

[Workshop on Copyright Limitations and Exceptions for Libraries and Archives, NLSIU, Bangalore | 04 March, 2016]

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# Framing the debate : some questions

## The libraries

What are libraries?  
Are there different kinds/categories of libraries?  
What is the role of libraries?  
Do libraries perform important socio-economic-political functions?  
What are some of the challenges faced by libraries?

## The law

Does the law influence the functioning of libraries?  
Does the law limit the functioning of libraries?  
Can the law enable the libraries to better perform their functions?  
Can the law help libraries overcome their challenges?  
Is there a gap between the reality/practice of the functioning of libraries, and the law?

# Framing the debate : finding some answers

## The libraries

- Institutions that **preserve + enable access** to knowledge and information, cultural heritage
- S. Ranganathan and the Five Laws of Library Science (1931)
- 50,000-60,000 public libraries in India
- UNESCO's Public Library Manifesto – “local gateway to knowledge” + “living force for education, culture and information” (Prashant Iyengar, 2010)
- The role of libraries is crucial at the juncture of the interests of rights holders and, the interests of other stakeholders (students, teachers, general public, researchers ++) in accessing knowledge and information

# ...contd.

## More about libraries

- Types:
  - Based on form of institution (**Public v. private v. institutional** (university etc.))
  - Based on physical form (**Brick and mortar v. digital**)
  - Based on type of content (**Print v. digital**)
  - Based on economic incentive/business model (**commercial/for profit v. non commercial/not for profit**)
- What challenges do libraries face?

# ...contd.

## Libraries and the digital

- Digital Libraries?
- Ease of replicating
- Ease of transmitting
- Ease of accessibility
- Simultaneous accessibility by multiple users
- Ease of manipulation/modification – questions on integrity of works?
- New kinds of search/linking
- Ease of preservation/storage
- Ease of acquiring
- ....

# ...contd.

## The law

- Establishment – Public Libraries legislation
  - In different states
  - “So far, **only half of the States** of the Indian Union have successfully passed the library legislation, However, in the coming few years, there is greater possibility for a library law being enacted in the remaining States. Out of these the enactment of Public Library Law at Puducherry State is in the forefront.” (National Mission on Libraries, at <http://www.nmlindia.nic.in/pages/display/24>)
- Legislation available for Andhra Pradesh, Gujarat, Harayana, Kerala, Manipur, Mizoram, Orissa, Rajasthan, Tamil Nadu, Uttar Pradesh, West Bengal, Chhatisgarh, Bihar, Maharashtra, Arunachal Pradesh (National Mission on Libraries, at <http://www.nmlindia.nic.in/pages/display/26>)

# ...contd.

## Chattisgarh Public Libraries Act, 2008

- Book “includes”
  - Volume + parts of volumes + newspapers + serial publications + periodicals + manuscripts | In any language
  - Sheet of music/ map/ chart/ plan separately printed or lithographed
  - Audio and visual materials | Different format are listed including computer, photographs etc.
- Public library “means”
  - A library
  - Established and maintained by the State Government/Local body/other organization receiving aid from the State Government
  - Declared open to the public
  - Includes any other library recognised by notification by the State Government
- Aided library
  - Library
  - Declared as such by the state government
- Establishes one State Central Library + one State Reference Library + one Government District Library in each district | Defines functions for all of them

## ...contd.

- ▶ Copyright law understanding is important for libraries
- ▶ Robust limitations and exceptions, i.e., fair dealing provisions are crucial for libraries to perform their functions
- ▶ **Certain acts not to be infringement of copyright”** – Section 52, The Copyright Act, 1957
- ▶ 52(1) The following acts shall not constitute an infringement of copyright...



# Examples of fair dealing : teaching/educational institutions

- ▶ 52(1)(i): 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
- ▶ 52(1)(j) Performance, in the **course of the activities** of an **educational institution** of [different categories of work....] by [staff/ students] **if the audience is limited to staff/students/parents/guardians/persons connected with activities of the institution (i.e., audience limited)**

# Examples of fair dealing : research/private study/publishing unpublished works

- ▶ 52(1)(p): The reproduction for the purpose of **research** or **private study**, or, with a view to **publication, of an unpublished** literary, dramatic or musical works (sic) kept in a library, museum or other institutions to which the public has access.
- ▶ PROVIDED
  - If identity of (any of the) author(s) is known to the institution, this clause applies only if reproduction is made **60 years after** the date of the death of the author(s) [whose identity is known]

# Examples of fair dealing : persons with disabilities

- ▶ 52(1)(zb): The **adaptation, reproduction, issue of copies or communication to the public** of **any work in any accessible format**, by-
  - (i) any person
    - To facilitate persons with disabilities to ACCESS works
    - Includes sharing of accessible format with any person with disability for **private/personal use, educational use or research**
    - **Commercial uses excluded**
  - (ii) any organization
    - working for the benefit of persons with disabilities
    - **IN CASE THE NORMAL FORMAT PREVENTS THE ENJOYMENT OF SUCH WORKS BY SUCH PERSONS**
    - **Provided**
      - Copies are made available on a **non profit basis**. Only costs may be recovered
      - Organization has to ensure that copies are used ONLY by persons with disabilities AND take reasonable steps to **prevent entry into 'ordinary channels of business'**

# Fair dealing for libraries

- ▶ 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**;

# Fair dealing : summing up

Multiple stakeholders

Limitation or exception  
to copyright

Limitation or exception  
is for limited uses,  
limited audience, limited  
actors capable of  
exercising

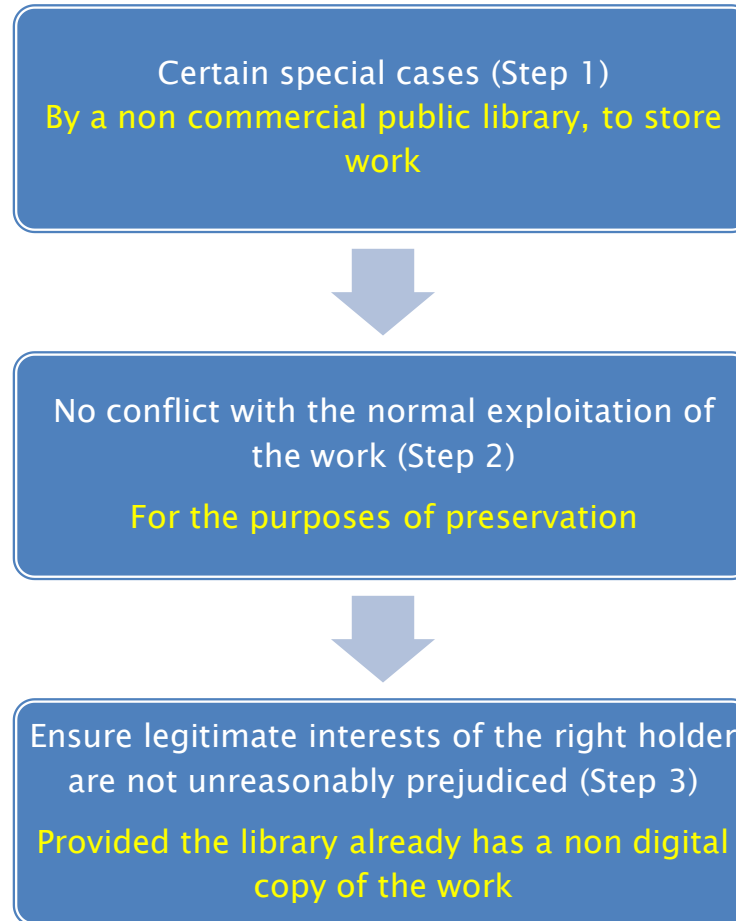
Limitation or exception  
is often subject to  
further  
conditions/provisos

Limitation or exception  
is typically for non  
commercial purposes

# Why are fair dealing provisions limited/restricted?

- ▶ Three-step test
  - In the Berne Convention, Article 9(2)
    - It shall be a matter of legislation
    - **In certain special cases (step 1)**
    - **Provided that the reproduction does not conflict with the normal exploitation of the work (step 2)**
    - **And does not unreasonably prejudice the legitimate interests of the author**
  - In the TRIPS Agreement, Article 13 (made the requirement to confine to the three step test more stringent than in the Berne Convention)
    - Members SHALL CONFINE limitations or exceptions
    - **To certain special cases (step 1)**
    - **Which do not conflict with the normal exploitation of the work (step 2)**
    - **And do not unreasonably prejudice the legitimate interests of the right holder**
  - Marrakesh Treaty – ‘compromise language’
  - Proposed instrument on limitations and exceptions for libraries and archives (WIPO-SCCR)

# How does India's library exception compare? (Section 52(1)(n) - Preservation)



# How does India's library exception compare? (Section 52(1)(o) – Making Copies)

Certain special cases (Step 1)

By a non commercial public library + Not more than three copies of a book may be made



No conflict with the normal exploitation of the work (Step 2)

For the use of the library



Ensure legitimate interests of the right holder are not unreasonably prejudiced (Step 3)

If such book is not available for sale in India



# Interpreting the library exception and further questions

## ON PRESERVATION – Section 52(1)(n)

- ▶ **Who can exercise the limitation and exception?**
  - Libraries
- ▶ **All libraries?**
  - No. Only NON COMMERCIAL PUBLIC LIBRARIES (under both – Section 52(1)(n) and Section 52(1)(o))
- ▶ **What is a library?**
  - No definition in the Copyright Act, 1957
  - Source from public library legislations? **But, these are different in every state; and, the Copyright Act is a central legislation.**
- ▶ **So, what CAN libraries do?**
  - Libraries can store material in electronic means
- ▶ **(From above ) Great! So, can libraries store any/all material in electronic form?**
  - No. They can only do so if they ALREADY POSSESS A NON DIGITAL COPY OF THE WORK. (i.e., libraries are allowed to digitize existing collections)
- ▶ **(From above ) Alright, so what can libraries do with this digitized material?**
  - Libraries are allowed to make copies for PRESERVATION
  - **Strange. Does preservation include access?** (Prashant Iyengar argues that it does)
  - **Preservation is only one part of what libraries do!**
  - **Libraries also help other legitimate stakeholders exercise their legitimate limitations and exceptions. (E.g. teachers and students in universities).**
  - **If the library exception is curtailed, are other limitations and exceptions also curtailed?**

# ...contd.

## ON MAKING COPIES- Section 52(1)(o)

- ▶ **Who can exercise the limitation and exception?**
  - Libraries
- ▶ **All libraries?**
  - No. Only NON COMMERCIAL PUBLIC LIBRARIES (under both - Section 52(1)(n) and Section 52(1)(o))
- ▶ **What is a library?**
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- ▶ **So, what CAN libraries do?**
  - Libraries can make copies of a book
- ▶ **What is a book?**
  - No definition in the Copyright Act, 1957
  - Source from public library legislations? These definitions include audio-visual material **But, these are different in every state; and, the Copyright Act is a central legislation.**
  - **Does it cover material that is 'born digital'?**
- ▶ **(From above ) So, how many copies can libraries make?**
  - Not more than three copies
- ▶ **(From above ) Alright, so what can libraries do with these copies?**
  - Copies are permitted for 'the use of the library'
  - PROVIDED that the book is not available for sale in India
- ▶ **So, what does 'available for sale in India' mean?**
  - **Does it (now) cover e-retailers?**
  - **Absolute interpretation - sale at any price v. Reasonable interpretation - sale at a reasonable price? (See Lawrence Liang, and, also, Prashant Iyengar)**

# Emerging issues and next steps

- ▶ Anti circumvention provisions
  - Do not cease on the expiry of the term of copyright protection
  - Cannot distinguish between legitimate and illegal uses
- ▶ Licensing agreements with overriding effects?
  - File format migration and preservation
  - Legitimate fair dealing/fair use by end users blocked?
- ▶ Cross border issues : Interoperability of national limitations and exceptions
- ▶ Different nations have differing standards and definitions
- ▶ WIPO Treaty on Limitations and Exceptions for Libraries and Archives?

# Select suggested reading and references

- ▶ The content in this presentation is sourced from the following material, and, is recommended reading on this issue.
  - Prashant Iyengar, The Library Exception under the Indian Copyright Act, 1957, available at: <http://ssrn.com/abstract=1555718>
  - Lawrence Liang, Exceptions and Limitations in Indian Copyright Law for Education: An Assessment, in the Law and Development Review (2010), Volume 3, Issue 2, page 196/197 onwards.
  - Ujwala Uppalpuri, 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)
  - Kenneth Crews, Study on Limitations and Exceptions for Libraries and Archives, available at: [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_29/sccr\\_29\\_3.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_29/sccr_29_3.pdf)

# Thank you!

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