

**“ACCESS TO KNOWLEDGE IS ACCESS TO POWER”:  
PROS AND CONS OF LIBRARY USE UNDER THE  
COPYRIGHT LAW**

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**Abstract:**

This article describes the reconciliation between copyright law and library services. On the face of it, libraries and copyright protection seem to be located at cross-purposes. One seeks to freely disseminate literature, and the other seeks to preserve the exclusivity of the same. However, looking deeper, one can find a basis for reconciliation of the two in that copyright law is aimed at preventing the unfair use of and unlawful gain from another's literature or other creative work, while libraries aim at distributing knowledge from this literature and other creative works.

The copyright act makes a sound balancing of the competing interest of the author on the one side and user on the other hand by recognizing library use as a privileged user right while upholding the moral and economic rights of the author. An attempt is made in this paper to examine the nature, extent and scope of this privileged use especially with a comparative analysis of the similar provisions in various national legislations. It's really interesting that inspite of a series of technological developments and changed perceptions of public interest the legal provision stands as it is without any amendments for the last five decades. So it is right time to look into the efficacy of this legal provision in the context of changed public interest and technological challenges. Suggesting a viable mechanism keeping into account of the fragile social and economic needs of the country is the final aim of this analysis.

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## **Balancing of Author Right and User Right Under the Copyright Law:**

The word, “copyright” derived from the Latin word ‘copia’, is translated as “plenty” and which means, in general, the right to make plenty or to copy.<sup>1</sup> In its specific application it means the right to make multiple copies of those products of human brain known as literature and art. It has also been defined as “the power to determine whether the work shall be published at all, the manner in which, if published, it shall be done, and to whom.”<sup>2</sup> So from the very definition of copyright, it is evident that the primary function of copyright grant is the multiplication of books and thereby spread of information.

Copyright is not simply a divine or inevitable right; in addition to its natural right justification<sup>3</sup> this right is having a larger utilitarian perspective, “the harvest of knowledge”<sup>4</sup>. The rights conferred by copyright are designed to assure the contributors to knowledge a fair return for their creative efforts<sup>5</sup>. Notwithstanding the need for monopoly protection of intellectual creators to stimulate creativity and authorship, excessively broad protection would stifle, rather than advance, the objective. First, all intellectual creative activity is in part derivative. There is no such thing as wholly original thought or invention. Each advance stands on building blocks fashioned by prior thinkers. Second, important areas of intellectual activity are explicitly referential. Philosophy, criticism, history and even natural sciences require continuous reexamination of yesterday’s theses<sup>6</sup>. So it should be assured that while enjoying copyright one must not put manacles upon science<sup>7</sup>. Thus copyright regimes share a number of intrinsic and extrinsic limits to promote the dissemination of knowledge and to ensure the preservation of vigorous public domain.<sup>8</sup> These limitations are the fixed duration of copyright protection<sup>9</sup>, the

<sup>1</sup> M Nimmer and D Nimmer, *Nimmer on Copyright- a Treatise on the Law of Literary, Musical and Artistic Property and the Protection of Ideas*, Mathew Bender & Co., New York, 1999 at p.13.

<sup>2</sup> Christopher May and Susan K. Sell, *Intellectual Property Rights: A Critical History*, Lynne Rienner Publishers, U.S.A, 1992, p.22.

<sup>3</sup> J. Locke, *Two Treatises of Government* (1690), edited by P. Laslett, Cambridge University Press, 1988, para. 27.

<sup>4</sup> Fisher, “Reconstructing the Fair Use Doctrine”, 101 Harv.L. Rev. 1659 (1988).

<sup>5</sup> Newman, “Not the End of History: The Second Circuit Struggles With Fair Use”, 37 J.Copyright Soc’y 1 (1990).

<sup>6</sup> Pierre N. Leval, “Towards a Fair Use Standard”, 103 Harv.L. Rev 1109 (1991).

<sup>7</sup> *Cary v. Kearsley*, 170 Eng. Rep. 679(1803).

<sup>8</sup> Lucie M C R Guibault, *Copyright Limitations and Contracts: an Analysis of the Contractual Overridability of Limitations on Copyright*, Kluwer law international, London, 2002, p.16.

<sup>9</sup> Copyright protection is not perpetual. It typically lasts for the life of the author plus sixty years after her death.

requirement of originality<sup>10</sup>, the idea-expression dichotomy<sup>11</sup> and the exhaustion or first sale doctrine<sup>12</sup>. Apart from these intrinsic limitations the copyright regime has designed a set of extrinsic limitations with the objective of dissipation of knowledge which is termed as fair use in U.S.A or fair dealing in U.K. Exceptions to protection break the monopoly of the right-holders by providing limited rights to use works without their consent. It is the limitations and exceptions to the monopolist's power that provide the breathing space for free expression and that encourage innovation and competition in the market<sup>13</sup>. These limitations to the exclusive rights, act as a safety valve between the structures of copyright and the access to knowledge.<sup>14</sup> Such legitimate interests<sup>15</sup> may include the protection of the users' fundamental rights<sup>16</sup>, the promotion of free flow of information<sup>17</sup> and the dissemination of knowledge.<sup>18</sup> Thus the copyright regimes around the world are enriched with plenty of fair use and fair dealing provisions to address the varying notions of public interests.

<sup>10</sup> The principle according to which copyright protection vest only in original works contributes also in maintaining the strength of the public domain. The level of originality necessary to obtain protection is the one criterion used to distinguish protectable from non-protectable subject matter.

<sup>11</sup> Corollary to the requirement of originality is the principle that copyright only protects the form of expression and not the underlying ideas. Anyone may communicate or reproduce the ideas contained in copyrighted material provided that the form of expression is also not reproduced.

<sup>12</sup> According to the exhaustion or first sale doctrine, once a work is sold or distributed with the consent of the right holder, the latter may not control or prevent further distribution of that work.

<sup>13</sup> <http://ipjustice.org/wp/campaigns/wipo/copyright-limitations-exceptions/>

<sup>14</sup> Harper & Row Publishers Inc. V. Nation Enterprises, 471 U.S. 539, 560 (1985)

<sup>15</sup> However, one must remember that the notion of 'legitimate interest' or 'public interest' is mostly a matter of national policy: what is in the public interest in one country is not necessarily the same in another. Technically, limitations reflect each legislator's assessment of the need and desirability for society to use a work against the impact of such a measure on the economic interests of the right holders. The outcome of this evaluation will most often determine which limitations are laid down in national legislation and the form that each particular limitation takes. This weighing process often leads to varying results from one country to the next. Indeed, some countries have adopted a very restrictive set of limitations on copyright, like France, Luxembourg, and India, while other countries, like the United Kingdom, Australia and Canada, have included extensive provisions in their legislation allowing acts to take place without the prior authorisation of the rights owner. Thus in course of time two general approaches to the provision of copyright exceptions developed. The first approach is to provide a small number of generally worded exceptions and the second is to provide a large number of much more specific exceptions, encompassing carefully defined activities. Although no country can be said to adhere rigidly to either approach, some countries lean towards one approach rather than the other.

<sup>16</sup> The fundamental right to privacy prevents copyright holders from exerting their exclusive rights in the intimacy of the private circle surrounding each individual.

<sup>17</sup> Limitations which serve the purpose of disseminating information offer members of society the opportunity of receiving the information enshrined in works of the intellect. Exemptions for library and archives are the best example for this.

<sup>18</sup> Exceptions for the purpose of research and educational use come under this.

### **Library use and copyright act:**

Library and information services are gateways to knowledge and culture. Libraries of all types are “people’s universities” and provide access to knowledge, learning and ideas; an essential component to fostering a creative and innovative society. They are vital to the creation of a well informed citizenry and a democratic and open information society.

This noble role of libraries in dissipation of knowledge was recognised by the copyright law since its inception. In the Statute of Anne of 1709 which is hailed to be the first copyright statute, it was mandatory that the author should deposit nine copies of the book with seven libraries as a condition of protection.<sup>19</sup> It is really appreciable that the statute imposed this as a mandatory duty on the author and monetary penalty was fixed for failure to meet this requirement. It was this codification which remained the base for library uses provisions in the subsequent copyright legislations, though it underwent series of changes in its nature, scope and extent.

However copyright exceptions applicable to libraries have been an important part of world copyright laws at least since 1956, when the English Parliament revised the British copyright law and enacted the first copyright exception specifically for libraries. As copyright law took on an increasingly international character, and as lawmakers looked to the laws of other countries for statutes to emulate, library exceptions became prevalent in many parts of the world through the last few decades. The growth of libraries, the expansion of computer technology, and the proliferation of library services have added to the demand for exceptions under copyright law to permit libraries to make copies of many works for research, preservation, and other purposes.

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<sup>19</sup> Para 6 of Statute of Anne: “Provided always, and it is hereby Enacted, That Nine Copies of each Book or Books, upon the best Paper, that from and after the said Tenth Day of April, One thousand seven hundred and ten, shall be Printed and Published, as aforesaid, or Reprinted and Published with Additions, shall, by the Printer and Printers thereof, be Delivered to the Warehouse-Keeper of the said said Company of Stationers for the time being, at the Hall of the said Company, before such Publication made, for the Use of the Royal Library, the Libraries of the Universities of Oxford and Cambridge, the Libraries of the Four Universities in Scotland, the Library of Sion College in London, and the Library commonly called the Library belonging to the Faculty of Advocates at Edinburgh respectively; which said Warehouse-Keeper, is hereby required, within Ten Days after Demand by the Keepers of the respective Libraries, or any Person or Persons by them or any of them Authorised to Demand the said Copy, to Deliver the same, for the Use of the aforesaid Libraries; and if any Proprietor, Bookseller or Printer, or the said Warehouse-Keeper of the said Company of Stationers, shall not observe the Direction of this Act therein, That then he and they, so making Default in not Delivering the said Printed Copies, as aforesaid, shall Forfeit, besides the value of the said Printed Copies, the sum of Five Pounds for every Copy not so Delivered, as also the value of the said Printed Copy not so Delivered, the same to be Recovered by the Queens [sic] Majesty, Her Heirs and Successors, and by the Chancellor, Masters, and Scholars of any of the said Universities, and by the President and Fellows of Sion College, and the said Faculty of Advocates at Edinburgh, with their full Costs respectively.

For these reasons, library provisions have become relatively common in copyright law, and they have become diverse and complex as countries have grappled with the context of library services as well as the changing expectations of copyright owners and publishers.

The report of a recent study conducted by the WIPO on copyright limitations for library uses is highly relevant for our study.<sup>20</sup> Of the 184 countries in WIPO, the research for this project collected current and translated statutes from 149 countries. Of those countries, 128 of them have at least one statutory library exception, and most of the countries have multiple statutes addressing a variety of library issues. Twenty-one countries<sup>21</sup> have no library exception in their copyright law.<sup>22</sup> The lack of a library exception does not necessarily mean that libraries in these countries have no lawful means to make copies or other uses of copyrighted works. The copyright laws may include provisions on fair use or fair dealing, or more common are statutes that permit individual copies for personal use. These statutes may be interpreted to permit library copying for institutional needs, such as preservation. The statutes are perhaps more clearly applicable to individual copies made by library users, and perhaps made by the library for the individual's private study. Just like any other legal philosophy, it is either the U.S model or the U.K model that has influenced the copyright laws of nations through out the world

The statutes differ greatly from one country to the next. The statutes can be distinct in nearly all respects, from their scope of applicable libraries to the specific activities encompassed. Some statute speaks simply about libraries, while some make distinction between commercial, noncommercial and institutional or organizational libraries.<sup>23</sup> This scope also includes archives.<sup>24</sup> Some statutes define not only the eligible institutions, but also the range of individuals who may make copies.<sup>25</sup>

<sup>20</sup> WIPO "Study On Copyright Limitations And Exceptions For Libraries And Archives" prepared by Kenneth Crews, (Director, Copyright Advisory Office, Columbia University) available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_17/sccr\\_17\\_2.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf).

<sup>21</sup> Burkina Faso, Burundi, Cameroon, Cote d'Ivoire, Democratic Republic of the Congo, Guinea, Libyan Arab Jamahiriya, Namibia, Senegal, Seychelles, Swaziland, and Togo, Iraq, Kuwait, and Yemen, Argentina, Brazil, Chile, and Costa Rica, Haiti and San Marino.

<sup>22</sup> Three additional countries have no copyright law and hence no library exceptions: Afghanistan, Laos, and the Maldives.

<sup>23</sup> Australia: Libraries that are not for profit, specifically meaning that the library is owned by someone carrying on business for profit.

<sup>24</sup> Eg, UK, US Copyright Acts.

<sup>25</sup> The United Kingdom law permits copies by librarians of prescribed libraries. The statute further defines "librarian" broadly as a person acting on behalf of a librarian. Where relevant, the U.K. statute gives similar treatment to "archivist."

Among statutes on one topic, such as reproduction of materials for research, the statutes set widely divergent standards with respect to the scope of materials that may be copied, the conditions and requirements for making the copies, the possible application of digital formats, and the circumstances under which the copies may be delivered to and subsequently used by individual researchers. For example, one country might openly allow the library to copy any type of work. The library can then copy textual materials, motion pictures, computer software, or any other work, within the other limits of the law, of course. The laws in another country, by contrast, may permit copying of only limited types of works. In yet another country, the law may for example allow copying of all types of works for preservation, but allow copying of only textual works such as books and articles for research purposes. While some allow such copying free of any charge, others allow it on payment of some amount of royalties and we can see in some jurisdictions the collecting societies engaged in that task. Occasionally a statute addresses the cost of the services provided by the library and whether they may be charged to the user who requests the copies for research or other appropriate purposes.<sup>26</sup> Some statutes stipulate that where use is made of copyrighted works for research or study or quotations mention shall be made of the source and of the name of the author if it appears thereon.

Many countries have a provision permitting the library to make copies of works for users without explicitly limiting the purpose of the copy to research, preservation, or any other particular use. Under these general statutes, libraries would presumably have tremendous flexibility when making copies of materials for users. The library is not limited to determining or assessing the precise reasons for making the copy. The purpose may be private study, or it may be for use in government, business, or other context. On the other hand, the statutes usually do include other parameters; the library is not free to make copies of any works in any amount. The statutes prescribing specific categories of library uses can be of three types: exceptions permitting libraries to make reproduction of works without explicit limitation to research, study, or similar purpose, exceptions permitting reproduction of all or nearly all types of works for purposes such as research and exceptions permitting reproduction of specified types of works for purposes such as research.

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<sup>26</sup> Pakistan, U.K.

Some statutes permits the library to make copies of copyrighted works without detailing the purpose, other than that the copies are for library users. These statutes give relatively broad rights for the library to make copies, with no obligation to confirm user's need for the materials. These general statutes principally appear in African and European law. Several countries have statutes that permit libraries to make copies for research or private study, but without detailing certain types of works. Presumably, the works could be books, articles, sound recording, archival manuscripts, or perhaps any other type of work. Many statutes further limit the scope of materials to textual works, such as books and articles, or they may have a series of separate statutes applicable to sound recordings, motion pictures, and other works.<sup>27</sup> A few countries have a statute for a general class of published works, plus a separate statute for copying of journal articles.<sup>28</sup>

While most research exceptions permit copying specifically for purposes of serving the research or study objectives of the library user, the statutes vary greatly in the extent to which they detail those conditions and the manner in which they have to be satisfied. The statutes typically provide that the copy must be for the user's private research or study, and stipulate little else. Yet a significant number of statutes provide precisely the terms on which the library must confirm the user's objectives. The statute provides that the copy must be for research or other such purpose, but with no stipulation about the level of proof or the responsibility for carrying the proof. Under this standard, the library may make and deliver the copy if it has specific awareness of the appropriate purpose, or if the library has no knowledge at all about the use of the copy. By this standard, a lack of knowledge on the part of the librarian satisfies the statutory requirement. Librarian must be satisfied of permitted purpose. User must satisfy the librarian that the purpose is permitted. This provision is different from the foregoing, in that it clearly places the burden on the user.

Preservation and maintenance of library collections occupies an important position in copyright laws. The preservation and replacement statutes are diverse in their detailed

<sup>27</sup> One of the unusual statutes on research copying is a special provision in Australia applicable only to unpublished theses kept in the library. The question of copying a thesis arises often in academic libraries, and ordinarily the library must evaluate it as it would any other work.

<sup>28</sup> The American statute is an unusual of provisions. For example, one provision of the U.S. exception permits copies of articles in periodicals. In nearly every realistic case, such a work will have been published. However, the U.S. statute also permits copying of portions of "other works" or even entire works under some circumstances. The statute lays out parameters for copying these works, but never indicating whether the work must be of a particular type or be published or unpublished. UAE is also having a similar provision.

conditions. Among the common conditions in these statutes: single copies only; copy of works currently in the library collection; the copy becomes a permanent part of the collection; the copying is for nonprofit purposes are important.<sup>29</sup> With respect to the Inter Library Loan, and Document Supply also we can see different models among the countries.<sup>30</sup>

Only a few countries have statutory provisions on the issue of liability for infringements committed by library users who make use of photocopiers or other equipment supplied by or on the premises of the library. Even though the library and its staff are not making the copies, and typically have no control over or knowledge of, the exact activities of the user, the library could be accused of infringement liability under the laws of some countries. For example, a library may face allegations of “contributory infringement”<sup>31</sup> by virtue of supplying the means for infringement. The issue of contributory infringement has become increasingly important in American copyright law. American law exonerates libraries from infringement liability if a warning notice of infringement is affixed on the library premises.<sup>32</sup> The American statute also applies to “reproducing equipment” and not merely to photocopy machines. As a result, the library should be able to gain protection from infringements involving microfilm readers, computers, digital cameras, scanners, and any other device that is capable of reproducing a copyrighted work. Few other countries have statutes addressing liability for the use of copy

<sup>29</sup> Canada has one of the more detailed statutes on this point. It sets forth a variety of circumstances that might make the work eligible for copying. The work must be rare or unpublished, and it must be (or at risk of becoming) deteriorating, damaged, or lost. Another option is that the original cannot be used because of required atmospheric conditions. Yet another possibility is that the original is in an obsolete format. The United States also allows preservation and replacement copying if the format of the original is obsolete. The U.S. law defines that concept by whether the device for using the work is commercially available. Slide projectors and phonorecord turntables may not be obsolete, but probably will in the near future.

<sup>30</sup> The Australian statute demonstrates the potential complexity of the matter. Section 50 of the Copyright Act addresses ILL as well as document supply. The library may make copies of articles and even whole works, but only after a search of the market and the filing of declarations by the librarian about the lack of availability of the work on the market. The statute adds a plethora of conditions defining market availability and stipulating exactly when a digital copy may be made. The United States has enacted a different model. Under American law, the library making the copy must generally assure that the reproduction conforms to the requirements of the research exception. American copyright law allows libraries to make copies of articles or other circumstances. The library receiving the copy is subject to the separate requirement that it does not receive copies “in such aggregate quantities as to substitute for a subscription to or purchase of such work.” Unlike in Australia, the library is not necessarily compelled to search the market for the work, but it does need to determine when it might have sufficient demand for copies, such that the library theoretically should own the work in question.

<sup>31</sup> In *Metro-Goldwyn-Mayer Studios v. Grokster*, 545 U.S. 913 (2005) the U.S. Supreme Court has ruled on the issue multiple times, most recently in a case defining when an online service is liable for facilitating infringing music uploading and downloading. The liability of libraries for supplying equipment is at least plausible.

<sup>32</sup> Section 108(f)(1) of the U.S. Copyright Act addresses the issue, albeit in the negative: “Nothing in this section . . . shall be construed to impose liability for copyright infringement upon a library” by the use of unsupervised equipment, if the library posts a warning notice on the machines.

machines or other equipment at the library. The Liechtenstein statute is actually a general right of the public to make copies of works for private purposes under specified conditions, and the statute provides that a person entitled to make the private copy may utilize the “copying apparatus” at a library. The library, in turn, is required to pay some form of remuneration to the author.<sup>33</sup> Swiss law has a similar provision. Singapore law offers protection for the library, and the “officer-in-charge” of the library, from infringements committed by users of machines installed at the library, if the library posts a prescribed notice. The protection, however, is technical: the library will not be deemed to have authorized the infringing copy “by reason only that the copy was made on that machine”.<sup>34</sup> Australia and Canada also have statutes on the same general matter.

These great variations among the statutes are one of the most important findings of this study, but patterns among the statutes are also evident. Some of the patterns are historical, such as the influence of British law in many countries. Other patterns are regional, such as the trend in many African countries to have either no library exception or a fairly general provision permitting libraries to make copies of works without many detailed requirements. Some patterns are the result of regional cooperation, most notably the European Union. As a result of a European Union directive from 2001, the library exceptions among the twenty seven members of the E.U. bear some similarities to one another. Nevertheless, some E.U. countries have added their own distinctive touches to the legislation, leading to important variations among statutes drafted even in a context where harmonization of the law is a priority.

To appreciate any single legislation as best is a difficult task. While at some point legislation may appear to be good, but on the other end it will be having its own defects. For example with respect to balancing the competing interests of authors and public, the Australian legislation appears to have a wise balance, because a series of rules have been prescribed before issuing copies and a request being proceeded. However all this safeguards remained to be futile when the act says that all this declarations need not be in writing? Similarly while the U.K legislation emphasis the interlibrary loan; Canada gives more importance to replacement and library preservation. However the U.S legislation in addition to her historic fair use standard has given consideration to all aspects of library use in a liberal manner.

<sup>33</sup> (Section 23(2)) of Liechtenstein copyright statute.

<sup>34</sup> (Article 19(1)(c)) of Swiss copyright Act.

Liberal provisions as in U.S can be enforced only in those countries where there is a rigorous enforcement mechanism scrutinizing strictly the violation and maintenance of rights. Otherwise such liberal provisions will result in negative impact in the long run. So a restrictive approach, but embracing all aspects of library use will be better for countries having lack of proper infrastructure. How far the standards set by developed ones will be suiting to the climate of a developing country is to be determined. India representing a typical developing one, we know that a vast majority of our population are ignorant of the term 'copyright' or its related problems. What the developing ones at present needed is not simply legislative provisions covering library privileges, but developing a community that know the advantages of library and a culture should be imbibed in them for respecting the sweat of such persons behind that knowledge storehouse.

### **Libraries And Digital Technology:**

The influence of technology did not wane after copyrights inception<sup>35</sup>. The origin and development of copyright law is inextricably linked to technological progress in communications. The first copyright law appeared after the invention of printing, with the object of securing for authors the right to control the reproduction of their works. Thus the history of copyright is the story of advances brought about by the impact of new technologies on creative works and their dissemination.<sup>36</sup>

In the digital, networked world nearly anyone possessing widely available technology can make virtually unlimited numbers of perfect copies of copyrighted works.<sup>37</sup> Creators and copyright owners are therefore facing unprecedented and uncompensated use and misuse of their works on a global scale and an increasing difficulty in detecting unauthorised copies because of their quality and the geographic extent of dissemination.<sup>38</sup> The digitisation of intellectual property

<sup>35</sup> Barry B .Sookman, "Copyright And Information Super High Way", 11 I.P.J 125 (1997).

<sup>36</sup> Victor Nabhan, "The New Copying Methods: Reprography And Sound And Audio Visual Recording", 3 I.P.J 49 (1987).

<sup>37</sup> Fleischmann, "The Impact of Digital Technology on Copyright Law" (January 1988) *Journal of Patent and Trademarks Office Society* at p. 5.

<sup>38</sup> T. C. Vinje, "A Brave New World of Technical Protection Systems: Will There Still be Room for Copyright?" [1996] E.I.P.R. 431

enables it to be used in many different media, to be copied at the same quality as an original, to be manipulated and distorted, and to be distributed throughout the world cheaply, easily and speedily.<sup>39</sup> Copyright holders therefore came with technological protection measures (TPMs)<sup>40</sup> to protect their works of intense creativity and imagination. However technology protection measures provide rights holders with a tool to 'fence in' information, just as the owner of tangible goods can lock them up.<sup>41</sup> Presumably rights holders will be tempted to exercise this factual monopoly as opposed to the limited statutory monopoly that copyright grants by fencing in more material and precluding more uses by technical means than copyright law enables them to do so.<sup>42</sup> Thus in course of time the limitations and exceptions to copyright which remains the central tool of copyright balance in ensuring knowledge and information dissipation became obsolete and archaic since it was swallowed by the TPMs. The problem became worse with the active intervention of law to protect TPMs and prohibit circumvention.<sup>43</sup>

Anti-circumvention laws can prevent libraries from availing of lawful exceptions under national copyright laws. This can prevent or place restrictions on sharing material, current awareness services, book reviews, and access for people with disabilities. Instead libraries have to negotiate special agreements with individual right holders to obtain TPM-free material or permission to circumvent in restricted circumstances. This is an option realistically enjoyed only by the largest

<sup>39</sup> J. Bannister, "Is Copyright Coping with the Electronic Age?" (1996) 4 *Australian Law Librarian* 11 at p. 13

<sup>40</sup> Technology protection measures enable the copyright owner to control the access and copying of the work and hence, offer him protection in the form of technology against technology. In technical jargon, this would mean, 'that works are simply stored in computer memory as a sequence of zeros and ones, with the ability to store extremely complex data in a very small space' The most apparent instance of this would be iTunes software of Apple, which ensures that the music is only compatible with that software and thereby prevents copying. Thus, the non-interoperability of Digital rights management (DRM) is a mechanism to combat piracy and theft of copyrighted work. Thus, the non- interoperability of Apple software with other systems, places technological restrictions on illegal copying and distribution.

<sup>40</sup> Gilchrist, "Copyright and the Digital Agenda; the US Experience" (1999) 11 *Australian Intellectual Property Law Bulletin* 37 at p.37

<sup>42</sup> Lawrence Lessig, 'Re-Crafting A Public Domain', 18 *Yale J.L. & Human.* 56.

<sup>43</sup> This imperative was for the first time addressed by the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (commonly called as WIPO internet treaties) of 1996.<sup>43</sup> Article 11 of the WIPO

Copyright Treaty provides: "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law." Article 18 of the WIPO Performances and Phonograms Treaty contains a parallel provision.

and best resourced libraries<sup>44</sup>. Underresourced libraries lacking the technical expertise or those in underprivileged communities, ironically the very ones standing to benefit most from digital technologies, will lose out on their statutory rights creating a digital divide. TPMs have the potential to lock away protected material forever. There is no clock that releases material into the public domain once the term of protection has expired. There is a great risk that the public record of the future may be distorted or will contain gaps because of TPMs<sup>45</sup>.

Humanity will face a digital blackout in the historical record and in the progress of research, scholarship and culture if measures are not taken to reinforce copyright exceptions and limitations governing library activity globally. The absence of effective provisions addressing use of digital information and the use of technological protection measures constrains libraries from performing functions that copyright law has long intended to support. Thus it is high time to update copyright laws of the print environment on an international scale to allow for adequate uses of digital information.

With the issuance of the WIPO Copyright Treaty (WCT) of 1996, the international copyright system laid the foundation for the enactment of protections against circumvention of technological protection measures (TPM). A recent study conducted by WIPO reports that sixty-five countries are contracting parties to the WCT. That accession does not necessarily mean that the country has completed enactment of the anticircumvention legislation, but it is an indication of the extent of acceptance of the concept. The research for this study has identified seventy-nine countries with legislation on anticircumvention. The anticircumvention statutes are similar in that they create a violation of copyright law based on the bypassing of TPMs. Otherwise, the statutes differ in many respects. Some statutes apply only to TPMs that control access to copyrighted works. Others apply to TPMs that prevent infringing uses of the works. Some statutes cover both. The exact violations also differ greatly. Three types of violations are mentioned in the statutes: the act of circumvention itself; the creating or trafficking of anticircumvention devices; and the offering of services that circumvent TPMs. Whether a law makes a violation of one or all of these activities will vary from one country to the next. While many countries have some form

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<sup>44</sup> Deutsche Bibliothek Joint Press Release, 18 January 2005 "Music industry and book branch sign an agreement with the German National Library upon the duplication of material protected by technical measures"  
[http://www.ddb.de/news/pressemitte\\_vervielfaeltigung\\_e.htm](http://www.ddb.de/news/pressemitte_vervielfaeltigung_e.htm)

<sup>45</sup> WIPO International Seminar on Intellectual Property and Development Geneva, 2-3 May 2005 available at [http://www.wipo.int/edocs/mdocs/mdocs/en/isipd\\_05/isipd\\_05\\_www\\_103978.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/isipd_05/isipd_05_www_103978.pdf)

of circumvention prohibition, twenty-six countries have enacted exceptions, including exceptions that are explicitly applicable to libraries.

The United States was among the earliest adopters of anticircumvention legislation (enacted in 1998), and it has perhaps the most extensive and elaborate exceptions.<sup>46</sup> The U.S. has exceptions that permit circumvention for purposes such as law enforcement investigation protection of personal information, creating software compatibility, and more. American law also authorizes the Librarian of Congress to create limited regulatory exceptions. Almost all of these exceptions are highly detailed, and narrow in application.

The library exceptions to anticircumvention vary widely in their application and the details of their scope. The U.S. exception is unique in every respect. It permits a library to circumvent the TPM only for the purposes of evaluating the protected work for purposes of determining whether the library would like to acquire it. In effect, the exception allows the library to sample a database or otherwise access a copyrighted work before making what might be an expensive or dubious purchase. Even within the confines of that limited application, the American statute is replete with limits and restrictions. In the end, the library not only has to determine that it has met all requirements, but then needs to engage in the unseemly activity of bypassing the password control or other TPM. Much more common is the model of a library exception that is prevalent among European Union countries. Much unlike the U.S. exception, the E.U. model<sup>47</sup> is comparatively succinct. In broadest terms, it seeks to assure that the TPM places on a copyrighted work does not interfere with the ability of the library to exercise any of the rights of use it may have under the various library exceptions for research copying, preservation, and other activities.

The E.U. statutes commonly place the burden on the copyright owner, publisher, or other party that places the TPM restrictions on the work. That party, under the statute, is obliged to allow libraries to have access to the work for purposes of carrying out the permitted library copying. The TPM exceptions from European Union countries usually apply much more widely

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<sup>46</sup>U.S copyright Act: § 1201. [Copyright Law of the United States (1976), as amended (consolidated version as of October 2007), available at <http://www.copyright.gov/title17/circ92.pdf>. ]

<sup>47</sup> WIPO Study “Automated Rights Management and Copyright Exceptions and Limitations” (SCCR 14/5, May 2006, at p.71), prepared by Nic Garnett, [http://www.wipo.int/edocs/mdocs/sccr/en/sccr\\_14/sccr\\_14\\_5.doc](http://www.wipo.int/edocs/mdocs/sccr/en/sccr_14/sccr_14_5.doc).

than just to libraries. The language is often written in an effort to assure that users may carry out the opportunities granted under a host of other statutory copyright exceptions. Under the E.U. model, the library may be compelled to ask the copyright owner to provide access, which could be a burdensome or unseemly process, surely prone to stir numerous questions about the library's activities and intentions.

Regardless of their relative breadth and general support for carrying out copyright exceptions, the law of anticircumvention continues to be problematic. To the extent that the law permits circumvention, the library is placed in the difficult position of needing to determine if it is within the law, then essentially hacking through the TPM. But the nature, extent and scope of the permissible and non-permissible uses needs clear articulation which ofcourse is a matter of legislative policy in accordance with the social, economic and political requirements of each sovereign nation. Blind extension of copyright policy of the analogue environment into the digital context without appreciating the consequences will totally upset the copyright balance.

### **Library Use under Indian Copyright Act:**

The Indian law on library use begins in a negative sense, exempting a legitimate library use from the ambit of copyright infringement.<sup>48</sup> While identifying what is a library use, the wordings of the corresponding provision looks very restrictive in scope and ambit. We can see that the library exception in India is applicable only to public libraries and it encompasses books that are not available for sale in India. Further it restricts the class of works and the manner of copying also.

Thus one of the significant features of the library exception in India is that the exception relates to public library. In other words it doesn't relate to any library, but only to a public library. But the problem is that the copyright act doesn't define the term library. In legal parlance a public library includes only the National Library at Calcutta, and any three other libraries, which may be specified by the central government in this behalf by notification in the official gazette.<sup>49</sup> Thus the library exception under the copyright in strict legal sense applies to a very narrow regime of libraries.

<sup>48</sup>Indian Copyright Act, 1957- s.52(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 public library for the use of the library if such book is not available for sale in India"

<sup>49</sup> The Delivery Of Books And Newspapers (Public Libraries) Act, 1954, Section 2(b).

The class of work as protected by the legislation at present is also very restricted, as the term 'book' includes only a pamphlet, sheet of music, map, chart or plan. There is no scope for making of copies for material other than books. There is the need to protect and preserve and to make available to public sound recordings and cinematographic films. Further in the context of digitisation and use of E-books and online journals, it would also important to permit a library to preserve and make copies of the work in a digital format.

The libraries are authorised to make copies of only those books that are not available for sale in India. This also is a restrictive approach, because even if the book is available for sale in India, in a developing country like ours where majority of the population struggles to make a living, very often the price of the book becomes unaffordable. So the category of books should be widened, taking into account of the noble role of libraries in knowledge dissipation. Similarly the stipulation of three copies is redundant and out dated in the context of digital technology. Multifarious library uses like research, private study, protection from loss and deterioration, interlibrary lending etc lacks mention in our law.

Thus the Indian law on library use took an extremely restricted approach towards the legitimate interests and rights of the library users and a gamut of issues is left untouched.

### **Conclusion:**

It's really interesting that, while most of our legislations are a blind reflection of western philosophy especially the philosophy of our colonial masters the library use provision under our copyright Act failed to appreciate either the common law approach of U.K or civil approach of U.S. Not only are the enforcement and monitoring mechanisms weak and toothless, but the provisions do not address a gamut of issues. In conclusion, it may be said that much needs to be done in this infant area when the information and technological revolution is on the rise as is copyright awareness.

As a preliminary attempt to expand the concept of library use, there could be a system of recognizing the libraries protected under the Act. There should be regulations set out for such recognition. As a natural corollary to the expansion of definition of library, there is the need to extend the class of works covered beyond books and include sound recordings and

cinematograph films. The condition that copies can be made of books 'not available for sale in India' should be substituted with the condition that books are 'not reasonably accessible to the public'. Challenges of digital technology and horizons of format shifting should also be brought within the legal parameters. A primary concern should also be raised with respect to reprographic rights and public rentals. Clear guidelines should be made to address the extent to which the library may permit the reproduction of the work, the fee payable to the right holder, as also whether there should be a rental fee payable to the right holder at all for which there is no structure in India.

Thus it is established that there is an immediate need for a new understanding of the role of library use exceptions. The library community asserts that exceptions and limitations maintaining the longstanding function of copyright law in society should be viewed as public rights balancing the private rights to information also granted in copyright laws. They should be seen as integral to the proper function of copyright as a means of supporting innovation, creativity and economic growth in all parts of the world. The new law should incorporate provisions for the multifarious needs of library.

A library should be permitted to make copies of published and unpublished works in its collections for purposes of preservation, including migrating content to different formats. Legal deposit laws and systems should be broadened to include works published in all formats and to allow for preservation of those works. Libraries should be able to supply documents to the user directly or through the intermediary library irrespective of the format and the means of communication. It should be permissible for works that have been lawfully acquired by a library or other educational institution to be made available in support of classroom teaching or distance education in a manner that does not unreasonably prejudice the rights holder. A library or educational institution should be permitted to make copies of a work in support of classroom teaching. Copying individual items for or by individual users should be permitted for research and study and for other private purposes. A library should be permitted to convert material from one format to another to make it accessible to persons with disabilities. The exception should apply to all formats to accommodate user needs and technological advances. To avoid costly duplication of alternative format production, cross-border transfer should be permitted. A general free use exception consistent with fair practice helps ensure the effective delivery of library services. An exception is needed to resolve the problem of orphan works, where the rights holder

cannot be identified or located. It should be permissible for libraries and their users to circumvent a technological protection measure for the purpose of making a non-infringing use of a work.

