

Legal Issues in ‘Digital Libraries’

Issue: Can Digital Academic Libraries Fall Within the Fair Dealing Exception under Copyright Law?

Introduction

- ❖ Physical libraries are slowly transitioning into digital spaces, enabling 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.
 - ❖ Even academic learning has become more reliant on digital learning resources in recent times. Access to necessary educational resources is one of the primary concerns.
- 2
- ❖ Educational institutions have raised concerns whether their activities fall within the ‘fair dealing’ exception under Section 52 of the Copyright Act, 1957.

Relevant Legal Provisions

❖ Section 52, Copyright Act, 1957 –

“Certain acts not to be infringement of copyright. – (1) The following acts shall not constitute an infringement of copyright, namely –

(a) A fair dealing with any work, not being a computer programme, for the purposes of –

(i) private or personal use, including research;” ...

(i) the reproduction of any work-

*(i) by a teacher or 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;” ...

*(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... [Emphasis supplied]*

Relevant Legal Provisions (Contd.)

❖ Section 52, Copyright Act, 1957 [Contd.]

(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;”

(p) the reproduction, for the purpose of research or private study or with a view to publication, of an unpublished literary, dramatic or musical work kept in a library, museum or other institution to which the public has access...”

4

Relevant Case Laws

- ❖ ***ICC Development v. New Delhi Television*, [CS(OS) No. 2416/2012, Delhi High Court, September 18, 2012]**
 - The court observed that “*it is both inadvisable and impossible*” to define the precise limits of fair dealing”. A ‘four-factor’ test was incorporated by the Delhi High Court to determine whether the defendant’s dealings would constitute ‘fair dealing’:
 - i. Purpose and character of the use
 - ii. Nature of the copyrighted work
 - iii. The amount and substantiality of portion used
 - iv. The effect of use upon the potential market

- 5❖ ***Chancellor Masters & Scholars of the University of Oxford v. Narendra Publishing House*, [2008 (38) PTC 385]**
 - The Delhi High Court reiterated that “*the Fair use provisions must be interpreted so as to strike a balance between the exclusive rights granted to the copyright holder, and the valid competing interest of enriching the public domain.*” The court relied upon the four factor test.

Relevant Case Laws (Contd.)

❖ ***Wiley Eastern Ltd. & Ors. v. Indian Institute of Management*, [1995 PTC (15) (Del) (DB)]**

- *“The basic purpose of Section 52 is to protect the freedom of expression under Article 19(1) of the Constitution of India, so that research, private study, criticism or review or reporting of current events could be protected. The court further opined that Section 52 is not intended by Parliament to be a negative prescription of what infringement is.”*

❖ ***Academy of General Education, Manipal v. B. Manini Mallya*, [2009 (39) PTC 393 (SC)]**

- *“When a fair dealing is made, inter alia, of a literary or dramatic work for the purpose of **private use including research and criticism or review**, whether of that work or of any other work, the right in terms of the provisions of the said Act cannot be claimed. Thus, if some performance or dance is carried out within the purview of the said clause, the order of injunction shall not be applicable. Similarly, appellant being an educational institution, if the dance is performed within the meaning of provisions of clause (i) of sub-section (1) of Section 52 of the Act strictly, the order of injunction shall not apply thereto also. Yet again, if such performance is conducted before a non-paying audience by the appellant, which is an institution if it comes within the purview of amateur club or society, the same would not constitute any violation of the said order of injunction.” [Emphasis supplied]*

6

Relevant Case Laws (Contd.)

❖ *Rupendra Kashyap v. Jivan Publishing House*, [(1996) 16 PTC 439]

- The Delhi High Court dealt with the applicability of the test of “**commercial exploitation**” in respect of the defence of fair dealing and stated that the defence of fair dealing would not be available to a publisher who commercially exploits the original work, and in doing so, infringes the copyright, even if the publication is meant for research or private study.
- *“What is contemplated is a defense to the person conducting research or private study who while doing so, if dealing fairly with a literary work, may not incur wrath of the copyright having been infringed. But, if a publisher publishes a book for commercial exploitation and in doing so infringes a Copyright, the defense under section 52(1)(a)(i) would not be available to such a publisher though the book published by him may be used or be meant for use in research or private study.”*
- 7 • Thus, it can be seen that fair dealing for the purpose of facilitation is allowed provided it does not fall in the ambit of ‘commercial exploitation’. [Emphasis supplied]

Relevant Case Laws (Contd.)

- ❖ ***The Chancellor, Masters and Scholars of University of Oxford & Ors. v. Rameshwari Photocopy Services & Ors.*, [CS(OS) 2439/2012, Delhi High Court, September 16, 2016]**
 - The photocopying of copyrighted material for distribution of ‘course packs’ was permitted and it was held that *“So long as the copying forms part of and arises out of the course of instruction it would normally be **in the course of instruction**”*.
 - The Court ruled that the amount or quantity of the material utilized does not matter as long as it is reasonably required to operate it for educational instruction in evaluating the permissibility of copyrighted work use under this exemption. According to the Court’s broad reading, the term ‘in the course of teaching’ refers to any action that comes within the scope of delivering educational instruction, **both before and after the actual act of lecturing**. It would mean the entire process or programme of education in a semester and not the process of teaching in the classroom alone. The court acknowledged that teaching does not involve simple lecturing by the teacher and taking of notes by the students in the classroom, but an interactive discussion based on the pre-reads etc. by the students that is regulated by the teacher. [Emphasis supplied]

8

Relevant Case Laws (contd.)

- ❖ ***The Chancellor, Masters and Scholars of University of Oxford & Ors. v. Rameshwari Photocopy Services & Ors.*, [CS(OS) 2439/2012, Delhi High Court, September 16, 2016] [Contd.]**
 - Relying upon Section 13(2) of the General Clauses Act, 1897, the court held that the word ‘reproduction’, meaning ‘making a copy of’, includes its plural as well i.e. making more than one copy of the original or photocopying. Similarly, it held that the words ‘teacher’ and ‘pupil’ also include ‘teachers’ and ‘students’ and thus concluded that making of multiple copies of a work by teachers or students is contemplated under this provision.
 - “*given that education in the country had long been institutionalized, Section 52(1)(i) would not be limited to reproduction in the course of individualized teacher-student interactions and would apply to reproduction by educational institutions in the course of instruction as well.*”
 - “*The end result would be, irrespective of the word 'course' being treated as a verb or a noun, the entire process of education as in a semester or the entire programme of education as in a semester. Meaning thereby in a class room where the interactive method of imparting knowledge is adopted by a teacher and not the boring method where the teacher simply lectures and the pupils simply note, the photocopied work, pre-read and digested by the students, is discussed and debated in the class in an interactive manner with the teacher regulating the discussion.*” [Emphasis supplied]

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”.
- ❖ The Copyright (Amendment) Act, 2012 replaced ‘public library’ with ‘non-commercial public library’ in various sections, but it has not been defined anywhere in the act or in any other statute.
- ❖ “Non-commercial public library,” is not defined in the Act. Various states have enacted their own laws on public libraries. On the basis of definitions contained in these acts, the understanding of a non-commercial public library is, 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;
 - b) which makes its collection accessible to the public;
 - c) non-commercial in the sense that it is not involved in trading-related activities (whether or not earning a profit by other means, like membership fees).

Conclusion

- ❖ Whether digital academic libraries constitute fair dealing is a contextual question to be decided on the facts of each case, considering several factors, including available alternatives and the nature of the dealing (commercial or non-commercial), purpose of the dealing, effect on the market, etc.
- ❖ The concept of ‘controlled digital lending’ can be explored.
- ❖ 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
- ❖ The pending Sci-Hub litigation in the Delhi High Court, where three major academic publishers have filed a copyright infringement against ‘Sci-Hub’ and ‘Libgen’ which provide free access to research papers/books, will provide some clarity on whether access to digital academic content falls within the ambit of fair dealing under the Act.
- ❖ The expansive and conjoint reading of Section 52(1)(i) and 52(1)(n), along with the interpretations seen in judicial pronouncements provides ample scope for digital academic libraries to avail the fair dealing exception.

THANK YOU!

Questions?

Tanisha Agarwal, Associate

© ALG India Law Offices LLP, 2022.

Disclaimer: Views, opinions, and interpretations are solely those of the presenters, not of the firm (ALG India Law Offices LLP) nor reflective thereof.

This presentation hosted at: <https://www.algindia.com/wp-content/uploads/2022/04/SLIS-Tanisha.pdf>