

Supported by:



National
Digital Library
of India

COPYRIGHT GUIDE FOR INDIAN LIBRARIES

Authors

Prof. Prabuddha Ganguli
Prof. Indranath Gupta

Prof. Vishwas H. Devaiah
Mr. Jagdish Sagar

- **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.

Contributors

Prof. Prabuddha Ganguli

CEO, VISION-IPR;
Former Visiting Professor, Rajiv Gandhi School of Intellectual Property Law,
Indian Institute of Technology Kharagpur;
Co-Principal Investigator, National Digital Library of India,
IIT Kharagpur; West Bengal, India;
Advisor, IIT Jodhpur.

Prof. (Dr.) Indranath Gupta

Professor, Jindal Global Law School
Dean of Research
Director, Jindal Initiative on Research in IP and Competition (JIRICO)
Senior Fellow, Jindal Institute of Behavioural Sciences (JIBS)
O.P. Jindal Global University

Mr. Jagdish Sagar

Advocate, New Delhi.

Prof. (Dr.) Vishwas H. Devaiah

Professor & Vice Dean and Director,
Centre for Post Graduate Legal Studies (CPGLS),
Executive Director, Centre for Intellectual Property Rights Studies and Managing Editor,
Academic Journals and Law Reviews, Jindal Global Law School

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.

Copyright:

Copyright belongs to the authors and the work is licensed under the terms of Creative Commons Attribution 4.0 International Licence
<https://creativecommons.org/licenses/by-nc-sa/2.0/>

Date of publication : **August 12, 2020**



Supported by:



**National
Digital Library
of India**

About The Contributors



Jagdish Sagar

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.



**Professor (Dr)
Prabuddha Ganguli**

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.



**Prof. (Dr.) Vishwas
H. Devaiah**

Prof. (Dr.) Vishwas Devaiah is a Professor at the Jindal Global Law School, Director of Centre for Post Graduate Law School. He is also the Executive Director of the Centre for Intellectual Property and Technology Law (CIPTL), and Director of JIRICO where he has led research and capacity building of JIRICO. Dr. Devaiah was awarded the 2015 Microsoft IP Teaching Fellowship to engage with researchers in the University of Washington Law School in Seattle.



**Prof. (Dr.)
Indranath Gupta**

Prof. (Dr.) Indranath Gupta is a Professor at the Jindal Global Law School, Dean of Research & Controller of Examinations at OPJGU. He is Director of JIRICO and Senior Fellow at the Jindal Institute of Behavioural Sciences (JIBS). His current projects include copyright infringement on online platforms with researchers at Nanyang Technological University in Singapore, National Digital Library of India Project with IIT Kharagpur, and FRAND licensing in the ICT sector.

TABLE OF CONTENTS

■ INTRODUCTION	5		
▪ What is Copyright?	5		
▪ The Concept of Public Domain	6		
▪ What are the Rights of Creator and Who would be the Owner of Works?	6		
▪ The concept of Author's Special Rights	6		
▪ What Works would not receive Copyright protection	6		
▪ Copyright Ownership:	6		
▪ International Conventions and Agreements	7		
▪ How to transfer Copyright	7		
■ COPYRIGHT AND LIBRARY OPERATIONS	7		
▪ Non-commercial public library	7		
▪ Electronic storage for preservation	8		
▪ Making of a Non-Digital Copy from a Preserved Digital Copy	8		
▪ Template for record-keeping	8		
▪ Copies of unavailable books	9		
▪ Books not available for sale in India	9		
▪ Template for record-keeping	9		
▪ Negotiating Licenses, Subscriptions to Books and Journals Especially with Regards to Electronic Resources	10		
▪ Electronic resources and Fair dealing exceptions	11		
		▪ Technology Circumvention	12
		▪ Orphan works -	12
		▪ Section 52(1)(p):	12
		▪ Section 31A:	13
		▪ Underlying works:	13
		▪ Performers' rights:	13
		▪ Making works available in a format accessible to persons with disabilities	14
		▪ Template for making work accessible to disabled persons	14
		▪ Compulsory Licence	15
		▪ Educational Exceptions	15
		▪ Display Publicising a library's collection	15
		▪ Making the collection available online	15
		▪ Users' Rights	15
		▪ Declaration by User/Patrons of the library	15
		▪ Template of Declaration	16
		▪ Institutional publications/ theses and dissertations/working papers	16
		▪ Government publications/ datasets	16
		▪ Concluding Remarks	16
		■ GLOSSARY	17
		■ END NOTES	21

Expressions in diverse forms are as old as human existence and have served as means of communication, documentation & recording of thoughts, events, and feeling. 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) provides protection for 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, architectural, 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. Neighbouring 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 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 with the objective of creating 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).

Under the Copyright Act, 1957 (as amended in 2012), henceforth called "The Act", "Copyright" connotes the bundle of "exclusive rights" (subject to certain exceptions as defined in copyright law) that the law confers on the owners of copyright. Thus, copyright subsists in all works that are not in the public domain and which are specified in the Copyright Act, namely literary, dramatic, musical and artistic works, and cinematograph films; sound recordings also enjoy copyright. It is to be appreciated that not all expressions are subject matter of copyright. Copyright Laws in various jurisdictions provide indicators that help to identify expressions that are copyrightable and differentiates them from those that are not copyrightable (Section 13 of "The Act"). The Copyright Rules, 2013 came into force from 14 March 2013 providing procedures to be adopted for the execution of various provisions of the Copyright Act.¹

Further, it is to be appreciated that Copyright can be enforced both in civil and criminal courts. The Copyright Act also provides for a constituted Intellectual Property Appellate Board as an alternative forum to the Courts for resolution of issues related to assignments and payment of royalties. Under specific circumstances related to copyright, the Customs Department under the Commissioner of Customs can exercise its powers to seize infringing imports in conjunction with courts that have jurisdiction.²

Registration of copyright is not mandatory. Copyright subsists with the author as soon as the work is created. The © mark with the name of the author and the date may be inserted in the form of a copyright notice in the work though it is not mandatory as well.

However, on registration of the work in the Copyright Office, the 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.³

The term of copyright in most cases shall subsist for the life of the author and 60 years after the death of the author. In some cases, including sound recording and cinematographic film the term is 60 years from the date of publication. It is to be appreciated that the term of copyright cannot be renewed.⁴

Terms and expressions frequently used in the field of copyright in conventional libraries and digital libraries are: works, original work, derivative work, ownership, author, adaptation, artistic work, literary work, work of sculpture, work of architecture, photograph, musical work, engraving, computer, computer program, course packs, performance, performer, composer, producer, cinematograph film, and audiovisual production, publication, broadcast, communication to public, cable-cast, infringing copy, bootlegged, fair use, fair dealing, transformative use, personal use, duplication equipment, reprography, sound recording, digitisation, e-books, e-publications, work of joint authorship, employment, contract of service, contract for service, government work, moral rights, copyright society and duration/term of copyright, licensing, transfer of rights, assignment [For more details please refer to the glossary at the end of this Guide].

The concept of Public Domain

The public domain comprises: (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 (copyright being a purely statutory right); 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

Central to copyright is the recognition of the creator and the owner of the work. Ownership, which is transferrable by "assignment" and for the use of which the owner may grant licences, means the right to exercise the exclusive rights enumerated in Section 14 (Sections 14 and 17 of "The Act"). Copyright subsists in the expression and not in the underlying ideas.

Hence documentation and establishment of the authorship, the time, place of creation of the work, the nature of the creative work and the circumstances under which the work is created are of significance as they determine the contour of rights of the author / owner of the work, nature of the right, the duration of the right and scope of monopoly. Copyright subsists as soon as the work is created.

Further, it is to be understood that "The Act" confers protection in the following two forms namely Economic Rights (named "Copyright" in our Act) and Moral Rights of the author (named "Author's Special Rights" in our Act).⁵

Both economic and moral rights subsist in original literary, dramatic, musical and artistic works; cinematographs films and sound recordings. The economic rights enjoyed by the owner of copyright are elaborated in Section 14 of "The Act".

The concept of Author's Special Rights

Section 57 of "The Act" refers to what are commonly called the "moral rights" of an author ("Author's Special Rights") specifically with regard to what are generally called "Right of Paternity", and "Right of Integrity". The "Right of Paternity" refers to a right of an author to claim authorship of the work and a 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 or his legal representatives shall have the perpetual 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 that would be prejudicial to his honour or reputation. The moral rights remain with the author even after the transfer (assignment or transfer of title of the work) of the economic rights.

What Works would not receive Copyright protection

Copyright protects "expression"; mere ideas, and concepts including but not limited to procedures, methods of work and mathematical concepts as such are not protected by copyright.

According to Section 15 of The Act, copyright shall not subsist under this Act in any design, which is registered under the Designs Act, 2000 (16 of 2000)]. Further, 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.⁷

Copyright is a purely statutory right: there is no copyright except as specifically granted by the Act. Section 16 of The Act states that no person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act or of any other law for the time being in force. Therefore, the list of the works in Section 14 are of significance.

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:

(1) 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.

(2) 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.

(3) 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.

(4) 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 American term "work for hire" is gaining currency 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 international conventions and agreements such as the Berne Convention; Universal Copyright Convention (UCC); the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention) 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); the Beijing Treaty on Audiovisual Performances.

As a member of the Berne Convention any work first published outside India in any of the convention countries enjoy protection in India at par with the protection granted to Indian works with the exception that 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 that are members of the relevant conventions.¹⁰

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.

How to transfer Copyright

The transfer of economic right in a copyright is called an assignment. "The Act" mandates that the mode of transfer of title of the economic rights in a copyright by way of an assignment by the owner of the copyright must be in writing, it must identify the specific rights assigned and should specify the period and territory. The assignee becomes the owner of copyright for the rights assigned to him. [Section 18 and 19]

The copyright owner may grant a license (Permission) by way of a contract for any specific use of the work. In the case of licenses, there is no transfer of ownership or title to the copyrighted work. Most licences are non-exclusive, i.e. the owner of copyright can grant such licences to as many users as he wishes. [Section 30]

COPYRIGHT AND LIBRARY OPERATIONS

Library operations need to be carried out respecting the rights of copyright owners. Further, the Copyright Act (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. However, the position is slightly different in the case of the library exceptions discussed below.

"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" 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

Electronic storage for preservation

Under Section 52(1)(n) of the Act a non-commercial public library may "store a 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 applies 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 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.

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 must be available in libraries. An indexed record of the such digital copies must be maintained at all times.

Template for record keeping

MAKING OF A NON-DIGITAL COPY FROM A PRESERVED DIGITAL 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 non-digital copy has been created from the backup digital 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. Second-hand books available from on-line retail or serendipitously from a second-hand bookseller should not be considered as being available for sale in India. The courts have held that items priced beyond the means of most people may also be treated as not available for sale in India.¹³

This exception is limited to non-digital formats. A "book" need not be sheets of paper bound between hard covers, 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.¹⁴

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).

Books not available for sale in India

For books that are not available for sale in India. It is important for libraries to exhaust all possibilities before photocopying multiple copies of the available copy. The Section in the Copyright Act containing this provision does not explicitly allow libraries to make three copies of e-books that are not available for sale in India. Therefore, the language of the Section deals with physical copies of books.

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

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 distributed 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 the provisions also covered under the Information Technology Act 2000 as amended from time to time.¹⁵

The Copyright Act must therefore also be read with the provisions of the Information Technology Act 2000 amended in 2008 which deal with issues related to "Electronic Signatures", "legal validity of electronic documents", "Technology Circumvention", "Intermediary liabilities", "Freedom of Expression", "Privacy & Surveillance", "Power to collect, monitor traffic data", "Encryption", "Cyber Crimes", and penal provisions.

Libraries serve as the nerve-centre of knowledge storing and circulation in educational institutions, especially in the developing world where access to knowledge is of the key concerns. 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" 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. The Chancellor, Masters and Scholars of Oxford University v Rameshwari Photocopy Services & Ors.¹⁶ Once prepared, digital course 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.

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.

Negotiating Licenses, Subscriptions to Books and Journals Especially with Regards to Electronic Resources

It has become necessary for libraries to maintain electronic resources and provide access to its 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 books or journals.

It is important to note that libraries do not 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 library to sign away privileges that libraries are provided under copyright law.

The terms of license that a 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 in multiple computers or provide access to the material through the network wherein multiple users can 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 License, Academic Consortia License, Public Libraries License, e-book and journal archive license and lastly the free trial licenses for a limited duration.¹⁷ Each of these licenses have their own nuances, advantages and disadvantages. However, regardless of the type of license 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 license allow the library to make the electronic database available only to its patrons or to any visitors or walk-in users to the library? In most instances license limits access to such databases to only authorized users of the library, especially if the content is allowed to be accessed through the library's network.

Electronic resources and Fair dealing exceptions

By "exceptions" we generally mean specific exceptions like those carved out in S.52 of the Copyright Act: these are acts which would be infringing but for their inclusion in S.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 (52(i)); 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) further 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 that of an infringing copy.

52(1)(c), is to be read with a provision 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): Any act included in S.14 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 licences 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 jurisdictions in which they will operate. However, copyright and other IPR laws will have to be applied taking into account the technological advances; 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. Law Experts and Information Managers / Librarians / IT Professionals will have to work together to resolve the challenging emerging interface issues. Further, librarians ought 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.

Further, the terms of license may impose restrictions on copying, downloading and printing of materials accessed through electronic databases. Terms of license 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 license. 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 such technological measures are not tampered in any way and impose restrictions on its authorized users to not circumvent it.

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 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 license 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.”

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”. Fair dealing exception is 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 abovesaid purposes through contractual agreement would defeat the provisions of Section 52 of the Copyright Act and, would, therefore, be unenforceable under Section 23 of the Contract Act.

Technology Circumvention

Section 65A provides protection against circumvention of effective technological measures (in effect, creating use or access controls to works uploaded on the Internet) that may be applied to copies of a work and provides for penalisation by way of imprisonment that may extend to two years and payment of a fine, subject to the exceptions laid down in the Section, which are quite broad.

Section 65B states that any person, who knowingly, removes or alters any rights management information without Management authority, or Information, 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, as well as to civil remedies. Digital rights management information includes means of identifying copies of a work (e.g. by digital “watermarking” and of tracing the copying and transmission of such copies.

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

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:

“... 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.”

“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), 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 subject to the “fair dealing” test of Section 52(1)(a). Section 52(1)(p) allows the reproduction of the entire work, not only for private use and research but even “with a view to publication”.

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 own 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 possibly succeed in restraining further publication or demand a licence fee (which would be prospective).

Section 31A:

Unlike Section 52(1)(p), Section 31A applies to all classes of work: artistic works, 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 Intellectual Property Appellate Board (IPAB) 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 IPAB. Royalty as fixed by the IPAB 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 IPAB 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 licences limited to online publication 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 IPAB (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.

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 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 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 right to royalty: 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, in regard to 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 may be 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 reproduction (even of the whole work) "for the purpose of research or private study" or "with a view to publication".

The orphan work exception, obviously, 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 in order 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 are 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 organisation that is making works available in accessible format to persons with disabilities includes an organisation registered under Section 12A of the Income-Tax Act, 1961 and working for the benefit of persons with disability or recognised 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 recognised 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 communication to the public of any work in any accessible format by any person to facilitate persons with disability 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 purpose 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.

- The access to the persons with disabilities is being provided on a not-for-profit basis and 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 accessible format will not be stored in multiple devices except for the limited purposes of creating a back-up 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

Compulsory Licence

Under Section 31B of the Act, the Intellectual Property Appellate Board may, on application following the procedure laid down, grant a compulsory license 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 musical works can be made available to the public.

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—

- 1- by a teacher or a pupil in the course of instruction, or**
- 2- as part of the questions to be answered in an examination; or**
- 3- n answers to such questions."**

The term "in the course of instruction", has been interpreted very liberally by the Delhi High Court *The Chancellor, Masters and Scholars of Oxford University v Rameshwari Photocopy Services & Ors*. 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 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 actually conducting instructional activities would be on safe ground in making extracts from works in its collection available for copying strictly for the purposes of Section 52(1)(i). The extracts should be relevant to the subject of the course pack and in no case should the whole book (howsoever short) be copied.¹

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.

Making the collection available online

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 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 is 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 other 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.

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 "authorising" infringement. 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/Patrons of library

Users and Patrons admitted in libraries are seldom asked to sign on copyright declarations framed within the legislative interventions on private use and research.

There isn't any standard form used in libraries and often 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.....residing atdeclare that following pages/chapter from (title of the copyrighted work) published by (name of the publisher) have been photocopied and that copy :

- 1- I will not use the copy except for research or private study.
- 2- To the best of my knowledge no other person with whom I work or study has made similar request for substantially the same content.
- 3- I will not distribute a copy of it to any other person and will not make multiple copies of the same.
- 4- I have not previously been supplied with a copy of the same material by you or any other librarian.
- 5- 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 influences operations related to libraries/ information centres. 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 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 still 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 copyright work, which may be 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 by means of electronic waves by a broadcasting organisation in accordance with its broadcasting licence in terms of mode of broadcast, wave length, 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 sound track. "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 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 which 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 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 (which otherwise are to be protected by copyright) or other material (which would include public domain works) 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.

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 a 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 copyright.

An exclusive licensee is also a copyright owner for the purpose of seeking legal remedies. It may be noted that in the case of Government works the first owner of copyright is the Government. The same principle applies to works created for public sector organisations and generally to international organisations 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 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 is not applicable 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 the nature, extent, purpose and commercial effect of any use of a copyright 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 a 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 with the exception of 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 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 a number of 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 in 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 broadcasting 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 never acceded to it, which has now become immaterial after India’s accession to

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 convention.

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 clearly 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 53, 65A, 65B; The Copyright Act, 1957 (14 of 1957) : Sections 63 – 63B
- 3** - The Copyright Rules, 2013: Chapter XIII, Registration of Copyright
- 4** - The Copyright Act, 1957 (14 of 1957): Chapter V, Term of Copyright
- 5** - The Copyright Act, 1957 (14 of 1957); Michael O'Hare, Copyright and the Protection of Economic Rights, *Journal of Cultural Economics*, Vol. 6, No.1 (June, 1982), 33-48; A Handbook of Copyright Law, Government of India: Department For Promotion of Industry and Internal Trade Ministry of Commerce and Industry<<https://copyright.gov.in/Documents/handbook.html > (last visited on 5th July 2020)
- 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 < 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> (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> (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 Ujwala 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** - To be inserted
- 14** - The Copyright Act, 1957 (14 of 1957): Section 52(1)(o)
- 15** - 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)
- 16** - RFA(OS) 81/2016, Delhi High Court
- 17** - James S. Heller, Paul Hellyer & Benjamin J. Keele, Librarian's Copyright Companion (William S. Hein and Co., 2012).
- 18** - The Copyright(Amendment)Act, 2012 (No. 27 of 2012)(An Act further to amend the Copyright Act, 1957)
- 19** - The Copyright(Amendment)Act, 2012 (No. 27 of 2012)(An Act further to amend the Copyright Act, 1957): Section 65A
- 20** - Tekla Corporation & Anr v. Survo Ghosh & Anr. AIR 2014 Del 184
- 21** - See Ujwala 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).
- 22** - Orphan Works and Mass Digitization: A Report of the Register of Copyrights <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf> (last visited 15 th May 2020)
- 23** - Intellectual Property Appellate Board: Government of India <https://www.ipab.gov.in/index.php> (last visited 14th May 2020)
- 24** - The Copyright Act, 1957 (14 of 1957): Section 52(1)(p)
- 25** - The case where the author is dead would not necessarily fall under the rubric "withheld from the public" which implies a deliberate act of withholding by the copyright owner. Thus, the author's being dead, but known, cannot per se be a ground for compulsory licence. "Withheld from the public" implies a deliberate act of withholding by the current copyright owner.
- 26** - The compulsory licence ceases if the author or copyright.
- 27** - CS(OS) 2439/2012) 16 Sep 2016, Delhi High Court
- 28** - Hubbard v. Vosper (1972) 1 All ER 1023 p. 1027, 471 U.S. 539 (1985).
- 29** - Associated Newspapers v News Group Newspapers, [1986] RPC 515.
- 30** - British Broadcasting Corporation v British Satellite Broadcasting Ltd. (1991) 3 All ER 833