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Kanishka Agarwal

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DIGITAL LIBRARIES AND FAIR USE

Kanishka Agarwal¹

Abstract

The paper aims to delve into the intricacies of fair use provisions within the framework of the Copyright Act 1957 specifically focusing on their application within the domain of digital libraries. The provisions relating to fair dealing set out under section 52 of the Act provide certain exemptions to libraries from infringement. These include exemptions relating to public libraries, private and personal uses and digital preservation. The paper traces the evolution of digital libraries as a product of the digital revolution while examining the fair use principles thereby highlighting the need to harmonised the author's right with public access to information. The paper discusses the challenges encountered by libraries while digitising their existing content into a digital format for preservation purposes, particularly when the material comprises an amalgamation of copyrighted and public domain works. The challenge surfaces due to the lack of clarity on how to preserve digital materials properly in copyright law. Libraries resort to different methods to acquire digital content which includes licensed work, unlicensed work or publicly available online content and claim such practice to be a fair use. The paper discusses this issue along with the impact of the Google Books project and the pending Sci-Hub litigation. Additionally, the paper provides insights from the Copyright Guide of the National Digital Library of India which clarified certain provisions of the Act concerning libraries and their fair use exemptions. The paper also references guidelines on fair use in an electronic environment provided by organizations like the Publishers Association and the JISC outlining what constitutes fair use and what doesn't for individuals and librarians, emphasizing compliance with licenses. At last, the paper concludes by providing certain suggestions to prevent copyright infringement in the digital environment emphasizing the need for clearer legislation or comprehensive guidelines tailored to the unique challenges faced by digital libraries in navigating copyright issues in the digital age.

Keywords: *digital libraries, fair use, fair dealing, digitisation, digital preservation, infringement.*

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I. INTRODUCTION

Copyright is concerned with providing and protecting ownership rights to the creator of original works, which includes authors, composers, artists, producers, and those involved in disseminating such works, such as publishers and broadcasters. By giving the creator or the work the exclusive rights, copyright law intends to incentivise creativity and innovation while preventing unlawful exploitation of such original work.

Copyright as a concept originated in the 6th Century AD when an Irish King Diarmid adjudicated a dispute concerning the ownership of the copy. The king declared, “*To every cow her calf, therefore to every author his copy*”.² This judgement emphasised the principle that the author has an inherent right over the copies of his original work.

However, the invention of the printing press marked the evolution of copyright protection by revolutionizing the methods of reproduction and copying. The advent of new communication and diffusion technology also made possible the easy copying of any original work which posed a great concern for Copyright infringement. In recent decades, the advancement of digital technology and the internet posed even more intricate problems. The whole economics was disturbed. Reproduction was affected by the digitalisation of information; distribution was affected by networking; and the publication was affected by the World Wide Web. In recent times, information is being captured, generated and processed digital formats more than ever at almost zero cost, creating a significant challenge for the enforcement of copyright. It also raised questions as to how copyright law should adapt itself to protect the interests of the creator as well as the public.

The rapid digitisation increases make it difficult to harmonise access and protection creating copyright issues. Digital libraries, an outcome of digital advancement, are one such area concerned with copyright issues. Digital libraries, a product of digital advancements, facilitate the storage, retrieval, reproduction, and dissemination of information resources. While they provide invaluable benefits to researchers, educators, and the general public, they also pose unique challenges to copyright law. For instance, digitisation of original work and temporary files stored and created in the computer’s short-term memory during interest

²IRISH TECH NEWS, <https://irishtechnews.ie/copyright-dispute-led-to-battle-of-the-book/#:~:text=After%20careful%20deliberation%2C%20King%20Diarmait,owner%20of%20the%20original%20text> (last visited Dec. 17, 2024).

browsing could raise copyright concerns, especially when the copyright law fails to provide clear guidance on the use of such work fairly.

Fair use provides certain exemptions to infringement of copyright, particularly for educational, research, and preservation purposes. It is outlined under Section 52 of the Indian Copyright Act, 1957 (hereinafter referred to as the “*Act*”) as is known as **fair dealing** in India.³ This principle is essential for digital libraries as it enables them to lawfully reproduce and disseminate copyrighted works within the limits of law. However, there remains an ambiguity regarding the application of this principle to digital libraries and its associated activities, such as the digitisation of copyrighted works for preservation, the handling of orphan works, and the use of copyrighted materials for public access. International concerns like the one illustrated by the Google Books project further exacerbate these challenges. Further, the growth of global networking and the internet have blurred jurisdictional boundaries, making it more difficult for national laws to address cross-border digital activities effectively.

The lack of comprehensive guidelines tailored to the unique needs of digital libraries has left them in a precarious position. While the fair dealing provisions provide an essential safeguard, their application in the digital realm remains uncertain. Therefore, it becomes important to harmonise copyright protections with the accessibility of information.

This paper explores the interplay between copyright law and the functioning of digital libraries, focusing on application of fair use principles.

II. UNDERSTANDING FAIR USE IN THE CONTEXT OF DIGITAL LIBRARIES

A Digital Library also called a *library without walls* is an electronic version of a traditional library where materials are stored in digital form. This format enables direct communication, allowing users to obtain and copy material from a master version.⁴ By combining technology with information resources, digital libraries provide remote access, effectively eliminating physical barriers to resources. These libraries are a compilation of online databases that include images, texts, audio, or videos, systematically stored, arranged and accessible via computer

³ The Copyright Act, 1957 § 52, No. 14, Acts of Parliament, 1957 (India).

⁴ *Introduction to Digital Library*, EGYANKOSH
<https://egyankosh.ac.in/bitstream/123456789/35931/5/Unit-5.pdf> (last visited Dec. 17, 2024).

networks. They provide a simple and efficient way to access a diverse array of materials, irrespective of their location and time.

The survival and success of such libraries depend upon the proper implementation of the fair use principle outlined in copyright law. This principle ensures that neither the economic nor moral rights of the author are exploited by unauthorised users. The purpose of the digital library can be said to make resources available to students, faculty and other users to fulfil their academic, research and training needs. To fulfil such a purpose, the librarians often seek to digitise a vast collection of works of the authors in the system and make them available to users. Once the work is available in the system, users may access it and use it according to their requirements which might include downloading, modifying etc.

As per section 51 of the Act, any unauthorised reproduction or distribution of a literary work is considered infringement.⁵ However, libraries can digitize reading materials and provide copies or excerpts to readers and scholars without infringing the copyright if it falls within the scope of fair dealing which allows libraries to engage in certain activities that promote education and research while respecting copyright laws.

To determine whether libraries should digitize the material available in hard copy or whenever the question arises regarding the issue of printing and downloading of digital work available in the library database, a fair use analysis should be conducted by libraries. *Fair use* or *fair dealing* refers to any copying activity of an original work that doesn't require permission of the author/copyright owner and doesn't include the payment of royalties.

The principle of fair use has its roots in U.S. judgement⁶ which established a four-factor test to ascertain whether a specific activity qualifies as fair use or not. These factors have been incorporated in their Copyright Act under section 108⁷ and is frequently used to evaluate infringement cases relating to digital libraries. However, Indian Copyright law does not adopt this four-factor test. Instead, in India, such exceptions are dealt with under section 52 of the Act.⁸ While the Act does not explicitly address digital libraries, it includes provisions that offer important exemptions relevant to their operations:

i. Exemption for Rentals Non-Profit Libraries

⁵ *Supra* note 2, § 51.

⁶ *Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569 (1994).

⁷ 17, U.S.C. § 108 (1958).

⁸ *Supra* note 2, § 52.

Section 2 (fa)⁹ of the Act excludes non-profit libraries from the ambit of commercial rental rights. This provision reflects the legislative intent to promote research and scholarship. Libraries that operate as non-profit entities, receive government grants, or benefit from tax exemptions are classified as non-profit public libraries. A digital library that meets these criteria can also benefit from this exemption, avoiding liability for infringing commercial rental rights.

ii. **Exemption for Private and Personal uses:**

Section 52 (1)(i)¹⁰ provides that the use of a work for any private and personal uses, including research, is fair use and would not amount to infringement. Research represents a significant portion of digital library usage, making this provision particularly relevant. This exemption enables digital libraries to support academic and research activities without violating copyright law.

iii. **Exemption for Preservation Purposes:**

Section 52(1)(n)¹¹ provides relaxation to non-commercial public libraries from infringement of copyright if they make digital copies of an already existing non-digital copy of work for preservation of work. This provision is crucial for maintaining access to works that may otherwise deteriorate over time or become inaccessible in their physical form. The importance of this exemption is further discussed later in the paper.

iv. **Exemption for Making up to Three Copies:**

Section 52(1)(o)¹² permits non-commercial public libraries to create 3 copies of a particular work not available for sale in India, provided such copies are created within the supervision of the person responsible person and used exclusively for library purposes.

While this provision does not directly address digital libraries, it holds relevance for their operations. With appropriate modifications, this exemption could be expanded to regulate and facilitate digital library practices.

v. **Exemption for Publishing Unpublished Work:**

Section 52(1)(p)¹³ gives an exemption from copyright infringement for research and personal study purposes, provided the intent is to publish an unpublished work stored

⁹ *Id.*, § 2(fa).

¹⁰ *Id.*, § 52(1)(i).

¹¹ *Id.*, § 52(1)(n).

¹² *Id.*, § 52(1)(o).

¹³ *Id.*, § 52(1)(p).

in a library, museum, or other publicly accessible institution. This exemption could be adapted for digital libraries, enabling them to make unpublished works available digitally while complying with copyright protections.

vi. Exemption for Conversion into Accessible Formats.

Section 52(1)(zb) permits the conversion of protected works into accessible formats for individuals with disabilities.¹⁴ Traditional libraries are permitted to transform the works into accessible formats such as audiobooks or braille provided such works are exclusively provided to individual with disabilities on a non-profit basis. Libraries must also take reasonable measures to ensure that these accessible copies are used solely by individuals with disabilities, preventing them from entering general commercial markets.

Digital libraries can efficiently implement this provision by creating e-books compatible with screen readers, text-to-speech features, and other assistive tools for visually impaired users. These accessible formats can be securely distributed to authenticated users through controlled platforms, preventing unauthorized sharing or misuse.

These provisions collectively provide a foundation for digital libraries to navigate copyright challenges within the Indian legal framework.

III. KEY CHALLENGES AND CONCERNS

1. Digitisation and Preservation

Libraries are increasingly leveraging digital technology to preserve printed and analogue works. By digitizing their collections, libraries aim to make information accessible to the maximum number of users while safeguarding their collections for future generations, ensuring that knowledge remains preserved and readily available to future researchers. This purpose encourages librarians to jump on the bandwagon of digital preservation. The process of digitization involves converting physical library resources, such as books, manuscripts, and other documents, into digital formats. In their digital form, these collections offer numerous user-friendly features, including advanced search capabilities, enhancing their usability by enabling word-by-word searches. This expands the capabilities of a researcher as they can now search across titles efficiently, no longer limited to a static library catalogue. The users can

¹⁴ *Id.*, § 52(1)(zb).

also bookmark highlight, annotate or add notes within the interface without any additional stationary involvement.

Notwithstanding such benefits, the digitisation of the existing database has several copyright issues. Publishers and copyright holders often perceive digitization as a threat to their revenue streams, raising objections to library efforts to digitize and share copyrighted content.

Hitherto, databases that have been digitised by the libraries were predominantly public works whose copyright term has expired or they failed to meet statutory requirements when created under earlier copyright laws. Therefore, the primary copyright issue revolves around ownership with some libraries claiming copyright over the digitised version. However, in recent scenarios, the digitisation performed by libraries often consists of a mixture of protected works as well as public domain works or even solely of protected works. Digitised works that consist of such works have difficulty in getting copyright clearance. When the copyright status of a work is unclear, librarians must ensure their activities do not infringe on copyright and remain within the scope of fair use.

Section 108¹⁵ of the U.S. Copyright Act allows libraries and archives to reproduce certain materials for preservation or research while restricting access to the reproduced digital copy within library premises. However, this provision includes limitations on what can be digitized, leaving ambiguities about the scope of permissible preservation activities in the digital age.

In the Indian Copyright Act, Section 52(1)(n) allows the storage of existing copies of a work for preservation purposes.¹⁶ This provision applies specifically when a library has a physical copy of the work in its possession. However, it does not specify how digital materials should be preserved, potentially leaving a gap in terms of backup procedures. Furthermore, this provision might be susceptible to misuse since digital materials can be easily copied and distributed, making them prone to copyright infringements that can be challenging to detect.

Additionally, Section 52(1)(o) sets a restriction of three copies for works that are not in circulation in India¹⁷. While this provision does not explicitly address digital copies, it is implied that digital copies are subject to the same limit. This interpretation aligns with Section 108(c) of the U.S. Copyright Act, which similarly limits digital copies to three and prohibits

¹⁵ *Supra* note 6.

¹⁶ *Supra* note 2 § 52 (1) (n).

¹⁷ *Id.*, § 52(o).

making them accessible to external users.¹⁸ Such restrictions primarily aim to safeguard the publisher's interest concerning the reproduction and distribution of work.

Certain archives have opted to digitize materials but opt to store digital copies in what is often referred to as a "dark archive," thereby keeping them inaccessible to users.¹⁹ In such instances, these institutions typically do not seek permission from copyright owners for digitization since their primary objective is preservation, not distribution. However, these restrictions can potentially undermine the very purpose of provisions intended for preservation. Preserving materials may not fulfil its intended purpose if these materials remain locked away in archives and are not made available to the public.

Therefore, the technology designed to tackle these issues can also hinder or obstruct necessary preservation efforts. Organizations responsible for preserving digital materials should recognize these concerns related to access, infringement, and preservation. Collaboration between libraries, copyright holders, and policymakers is essential to establish rights and protocols that balance the interests of all parties while promoting the effective preservation of knowledge.

2. Acquisition of digital content

Libraries obtain digital works through various methods to cater to different needs, including accessing online-exclusive materials, acquiring licenses for bundles of full-text journals, and purchasing or subscribing to digital content. These approaches allow librarians to meet user preferences and the growing demand for digital resources. They find it easier to manage this type of content since they obtain the necessary licenses for their usage. Libraries also acquire content without a license agreement treating such acquisitions similarly to owning physical copies.

A prominent example of a digital library is the **National Digital Library of India (NDLI)**, established under a project by the Government of India through its Ministry of Education.

¹⁸ *Supra* note 2, § 108(c).

¹⁹ N. Gasaway, *Digital Content, and Copyright*, 12 VAND. J. ENT. & TECH.L. 755, 763 (2010).

NDLI serves as a repository of textbooks, audiobooks, articles, lectures, videos, fiction, simulations and other learning media with search and browse facilities.²⁰

Libraries also collect and preserve content available across various websites and blogs. This content could encompass a wide range of online sources, including websites related to local elections, those generated in response to natural disasters (e.g. Cyclone *Biparjoy*), and blogs covering a wide range of topics relevant to a specific library's user base. By actively replicating digital content and storing it on their servers, libraries can accomplish this task. They would curate compilations of publicly available websites, selecting them based on criteria such as subject matter and local relevance. These curated collections would then be carefully organized and preserved for future use. This practice ensures that libraries can provide valuable and up-to-date information to their patrons, covering a broad spectrum of subjects and events.

Currently, Indian legislation lacks specific provisions concerning the preservation and use of publicly available content by librarians, but libraries around the world do so claiming it to be a fair use. To regulate such practices, an **opt-out system** can be introduced. Under this system, content creators, or owners such as those managing commercial websites would have the option to object to the reproduction and preservation activities carried out by libraries. This would provide a balance between protecting creators' rights and enabling libraries to fulfil their role in preserving and disseminating information.

3. Case Study: Impact of Google Books Project

The **Google Books Project** was an ambitious initiative that sought to digitize and transform the way books are searched and accessed globally. As part of the project, libraries collaborated with Google by bundling books and sending them to Google for digitization, and after this process, Google returned the physical books to their respective libraries. The project encompassed both public domain works, with full online access, and copyrighted works, which were only available in limited snippets. In exchange for their contributions, libraries received digital copies of the works they provided to Google.²¹

The project, however, faced significant criticism and legal challenges from copyright holders. Concerns were raised over issues such as adequacy of class representation in litigation,

²⁰ Indranath Gupta, Jagdish Sagar, Prabuddha Ganguli & Vishwas H. Devaiah, *Copyright Guide for Indian Libraries*, IIT Kgp (2021) https://librarykvgn.wordpress.com/wp-content/uploads/2021/08/copyright_guide_for_indian_libraries.pdf.

²¹ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 207, 2d Circuit (2015).

antitrust implications of Google's growing digital repository, handling of orphaned works (works that have no identifiable rights holder, but might be protected under Copyright), and fundamental copyright infringement concerns related to digitisation and sharing of protected materials.

In the landmark decision, the court ruled in favour of Google and held that the actions of Google constituted fair use as the work was transformative in nature, noting that digitization provided new ways to access and search books without replacing the original market for these works. Moreover, the court also stated that the distribution of digitized copies by Google to the libraries with the expectation that the libraries will utilize copies in a manner compliant with copyright law does not amount to infringement.

The case also provided clarification on **controlled digital lending**. It was stated that a library is entitled to "lend" an electronically scanned version of that book to a user, provided they:

- Own a physical copy of the book.
- Use suitable digital rights management (DRM) to protect the content.
- Ensure that the lending is consistent with fair use and the doctrine of first-sale, which allows libraries to lend out purchased books without additional permissions from copyright holders.

This interpretation would enable libraries to assist remote users in a manner similar to lending out physical books.

After this case, the **US Copyright Office** issued a guidance paper on **orphan works** stating that individuals or entities that genuinely tried to locate the original authors in good faith and then digitise orphan works shouldn't be held accountable for any infringement of Copyright.²² This guidance provided much-needed clarity on handling such works, balancing accessibility and copyright protection.

The Google Books Project case ultimately played a significant role in shaping modern copyright discourse, particularly in issues of orphan works and controlled digital lending. It underscored the importance of balancing technological advancement and accessibility with the protection of intellectual property rights.

²² Supra note 13.

4. Case Study: Sci-Hub litigation

*Elsevier Ltd. & Ors. v. Alexandra Elbakyan & Ors*²³, commonly referred to as the **Sci-Hub Case** is pending before the Delhi High Court. The case highlights the conflict between digital accessibility and the interests of academic publishing. **Libgen** and **Sci-Hub** are online platforms that provide free access to research articles that are otherwise monetarily prohibited by bypassing paywalls. Publishers like Elsevier Ltd. Wiley India, and the American Chemical Society challenged such platforms arguing that they infringe copyright and undermine revenue models. On the other hand, Sci-Hub argued that they provide access to knowledge, especially for researchers and students in resource-constrained regions, seeking recourse under Section 53(1)(i) which provides protection against the use of a copyrighted work in the course of teaching or instruction.

Justice Midha of the Delhi High Court highlighted the public importance of the matter underscoring the delicate balance between protecting intellectual property rights and the promotion of the dissemination of knowledge. A balanced approach is necessary, where digital libraries can navigate copyright challenges without compromising equitable access to knowledge. The outcome of the case could serve as a pivotal reference point in shaping policies that support the coexistence of intellectual property rights and digital accessibility.

IV. CURRENT GUIDELINES AND PRACTICES

Digital Libraries operate at the convergence of technology, access, and IPRs. Several national and international organisations have made guidelines and rules to address the issue of fair use to resolve problems of libraries in their digitisation and efforts to protect the creator's rights.

a) NDLI Copyright Guide for Indian Libraries

NDLI has come up with its Copyright Guide for Indian Libraries for both non-digital and digital libraries. This Guide was prepared keeping in mind the need of current times, where new technologies and knowledge gatekeepers make it difficult for librarians to comprehend and deal with a variety of copyright-related difficulties.

In February 2018, NDLI organized the inaugural “*National Workshop on Copyright Challenges in Digital Libraries*”, drawing participation from over 200 libraries and

²³ Elsevier Ltd. And Ors. vs Alexandra Elbakyan And Ors 2022/DHC/004702.

information professionals across India. During this event, discussions were centred around the creation of a seamless multilingual information and data resource platform. A team of experts provided valuable insights and suggestions relating to the Copyright Act, including potential pitfalls and exceptions applicable to libraries in India, and global best practices. As a result, NDLI decided to take action by initiating the development of a comprehensive Guide with an aim to equip librarians with a thorough understanding of the nuances of the Indian Copyright Act and enabling them to efficiently carry out their responsibilities while adhering to copyright-related regulations.²⁴

NDLI Guide clarified some of the provisions of Copyright relating to libraries.

- **Scope of non-commercial public library:**

It defined the scope of non-commercial public libraries. This clarification holds significant importance, as the exceptions outlined in Section 52(1)(n) & (o), which pertain to digital storage for archival purposes and reproduction of books not accessible in India for library use, are exclusively applicable to the non-commercial public library, the definition of which is not provided in the Act.

A non-commercial public library is defined to include 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.”

- **Clarification on Section 52(1)(n):** It clarified that the creation of a non-digital copy from the preserved digital is allowed under Section 52(1)(n). This clarification would enable librarians to replace those non-digital copies that are lost, destroyed or damaged, without fear of inadvertent copyright infringement.
- **Books not available for sale in India:** Meaning of *“books not available for sale in India”* include second-hand books available coincidentally from a second-hand bookseller or from online retailer. Additionally, after copies have been made in good faith under this exemption, making the work available for sale in India, then libraries can use these copies as if they were made lawfully during the time of their making and their use is not restricted under the Act.

²⁴ *Supra*, note 18.

- **Orphan Works:** The Indian Copyright Act was not actually drafted to deal with orphan works, so an analysis is required to ascertain how the provisions of the Act can be made applicable to orphan works. To make orphan works accessible to the public, the works need to be published. Section 3 of the Act broadly defines publication to include issuing copies, broadcasting, or uploading online. If the copyright owner's identity or publication status becomes known, the institution cannot claim exceptions. Librarians must exercise due diligence before categorizing a work as orphaned.
- **Clarification on Section 52(1)(p):** This section concerning the unpublished works in institutions with public access is not applicable in cases where the institution knows the author's identity, even if the author is untraceable. Therefore, it is not applicable to orphan works.
- **Publication of orphan works:** Section 31A allows the publication of orphan works if they are not available to public and the author is unknown, dead, or untraceable. High Court is authorised to grant a compulsory license for such works after following prescribed procedures and conditions. Libraries could reduce costs by applying for online-only licenses, with fees based on digital publication.

The NDLI guide underscored the transitioning of physical libraries into digital ones. It emphasised the importance of libraries confirming copyright ownership for the work and obtaining authorization to digitize them for non-commercial public use.

Digitisation has become a common activity in most institutions. It is crucial to handle digitization projects with utmost caution, particularly when it comes to adhering to copyright regulations. An essential step is to evaluate what can be digitized solely to create archives for preservation or distribution. Libraries handling interlibrary loans of electronic resources, whether they are self-created or acquired, must exercise careful copyright diligence. Exemptions applicable to physical libraries do not cover those primarily housing e-books. Consequently, libraries must rely on the terms of their agreements with copyright holders before making additional copies of electronic books. NDLI has emphasised solving copyright issues by referring to individual license agreements.

Access to essential educational materials for higher education in a developing country like India is a major concern. The judiciary has clarified that libraries can contribute significantly to the creation of course packs.

As per the Delhi High Court decision,²⁵ libraries have the authorization to develop digital course packs using educational institution materials for instructional purposes. After their creation, these digital course packs can be broadly disseminated. Hence, libraries should consider implementing access control mechanisms to restrict usage to individuals affiliated with educational institutions.

While the NDLI guidelines serve a valuable purpose in the absence of specific legislation for digital libraries, their approach to the determination of fair dealing, which considers the individual circumstances of each case, introduces uncertainty. This could potentially lead to a situation where users, to avoid legal liability, may err on the side of caution and limit their rights when they are unsure. This tendency to be overly cautious contributes to a culture where obtaining clearances and permissions become a common practice which could essentially involve individuals waiving certain aspects of their user rights as part of a contractual agreement.

b) International Guidelines

Application of Berne Three Step Test

Berne Convention under Article 9(2) provides for a 3-step test which has also been incorporated into several international agreements. This test lays down limits on the exceptions to the copyright holder's rights. It states that:

- i. Limitations to copyright law are allowed in certain special cases,
- ii. They should not conflict in the normal exploitation of the work, and
- iii. They should not cause unreasonable prejudice to the interest of right holder.²⁶

The application of this test to digital libraries:

- i. **Certain Special Cases:** Exceptions for purposes such as education, research or preservation could be relied on by Digital Libraries as seen in the case of Libgen and Sci-Hub, or by providing access to visually impaired users. These exceptions serve the public interest in the context of academic and research and could qualify as "Special Cases".

²⁵ RFA(OS) 81/2016, Delhi High Court.

²⁶ Berne Convention for the Protection of Literary and Artistic Works, art. 9(2), Sept. 9, 1886, 1161 U.N.T.S. 3.

- ii. **No Conflict with Normal Exploitation:** The activities of digital libraries shouldn't substitute the commercial markets of copyrighted works. Libraries should restrict the unauthorised distribution and access to copyrighted materials. The practice of controlled digital lending where only one copy is available for each physical copy would align with this requirement.
- iii. **No unreasonable prejudice of legitimate interests:** To prevent unauthorised reproduction and sharing, digital libraries should implement technological safeguards. Some methods like limiting the number of downloads, restricting access to registered users and adopting robust DRM systems could be used.

However, the interpretation of “special cases” and “normal exploitation” in the context of evolving technologies remains ambiguous. Additionally, obtaining permissions or licenses for orphan works or out-of-print materials can be burdensome and costly.

Guidelines by JISC and PA on Fair Dealing in Electronic Environment²⁷

The Joint Information Systems Committee (JISC) and Publishers Association (PA) have provided certain guidelines on what constitutes fair dealing or fair use and what does not when certain activities are carried out by individuals and librarians in an electronic environment. The objective of these guidelines is to harmonise accessibility and copyright protection in a digital environment.

Fair Use

- i. **Incidental Copying:** When an individual views an electronic publication, incidental copying to that individual's computer hard disk cache may occur automatically. It is not an infringement.
- ii. **Printing for Personal Use:** It's considered fair use for an individual to print a part of an e-publication for research or personal use.
- iii. **Librarian Assistance:** A librarian is allowed to print a portion of an e-publication upon a request from an individual.

²⁷ JISC and PA, *Guidelines for Fair Dealing in an Electronic Environment*, 1998.
<https://www.ukoln.ac.uk/services/elib/papers/pa/fair/intro-old.html#issues> (last visited Dec 17, 2024).

- iv. **Access via Subscription:** If a library possesses a paid subscription to an electronic journal and an open-access computer, it is permissible to print an article for research or personal study, provided it complies with the license agreement.
- v. **Partial Printing:** A librarian is permitted to provide a printed copy of a single chapter from an electronic book, but not the entire book.
- vi. **Copying for Personal Storage:** An individual can make a copy of part of an e-publication for permanent storage on a portable or tangible medium which can only be accessed by a single user at a time, as proper licensing is necessary for copying the entire publication for permanent storage.

Not Fair Use

- i. **Restrictions on Downloading:** Downloading an entire e-journal to a personal computer is not allowed without the copyright owner's permission.
- ii. **Scanning Articles:** Scanning an article into digital format is not permitted. Even if the permission is granted, the library needs to determine whether it can retain a permanent copy.
- iii. **Sharing Over Networks:** Sending the entire electronic publication over a computer network for long-term local digital storage, on-screen reading, and printing is not fair use.
- iv. **Transferring Articles:** Transferring all the articles relating to conference proceedings to a pen drive for personal reading at home is not fair use.
- v. **Sharing on Public Networks:** Sharing of an e-copy of a publication on a public network or website without permission is not permitted.
- vi. **Posting Journal Articles Online:** Posting a selection of interesting journal articles on the website of an organisation without permission from the copyright owner is not fair use.

These guidelines underscore the importance of adhering to copyright laws and license agreements while ensuring access to digital resources in libraries and other academic settings.

V. WAYS TO PREVENT INFRINGEMENT

Copyright is not an absolute right; it has certain limitations in the form of fair use. However, caution had to be taken to prevent the abuse of the fair use principle. There could be certain ways that can be implemented to prevent unauthorised use in the digital environment.

1. **User Declarations:** Librarians should continue the practice of having individuals sign a form, either on paper or electronically with reliable authentication, confirming that any copies made are intended for research or private study purposes.
2. **Controlled Access:** Digital libraries can protect access using either passwords or IP-based authentication, making sure that only authorised users have access to the collection, and effectively preventing misuse.
3. **Watermarking:** Watermarking, such as using software like *Star Watermark*, *uMark*, *iWatermark*, etc. can be a solution for protecting digital content. However, it's important to note that some software can alter watermarks.
4. **Automatic Deletion:** When libraries scan and share copyrighted materials under fair use provisions, multiple copies may be created in the system during the process. To align with fair dealing, electronic copies, except the one for personal research and study, should be automatically deleted after PC-to-PC transmission.
5. **Digital Object Identifier (DOI) System:** Using DOIs can help detect copyright infringement, trace their source and prevent misuse of digital resources.

VI. CONCLUSION

Intellectual property aims to foster societal development by balancing the moral and economic rights of copyright owners with public access to creative works. So not just the rights of the creator, but those of users are also important as it facilitates the broader objective of innovation along with progress. The “fair use” principle plays a crucial role in maintaining this balance, especially in the domain of digital libraries.

Intellectual property rights issues surrounding digital content are notably more intricate compared to printed materials. Within this digital landscape, IPR concerns extend beyond the content itself to include any associated software. Additionally, the ease with which digital materials can be duplicated and disseminated raises concerns among rights holders to safeguard their content and control access to prevent potential copyright infringements. The parties concerned and organisations responsible for preserving digital materials must acknowledge and tackle concerns related to copyright infringement.

Digital libraries play a pivotal role in preserving and disseminating knowledge globally by leveraging technology to overcome traditional barriers to access. However, they must navigate intricate copyright challenges, including digitization, licensing, and issues related to orphaned and out-of-print works. Landmark cases such as the Google Books Project and ongoing legal

debates like the Sci-Hub litigation have shaped modern copyright discourse by highlighting the need for a harmonised approach that addresses the concerns of rights holders while ensuring knowledge dissemination.

The existing guidelines for digital libraries are dispersed and lack a definitive criterion for assessing fair use in a digital context. The guidelines provided by NDLI, although insightful, are also insufficient to address the unique challenges posed by digital libraries.

The absence of specific legislation for digital libraries in many jurisdictions, coupled with the ambiguity in applying international principles like the Berne Three-Step Test, calls for further clarity and comprehensive frameworks to govern digital libraries.

To ensure that digital libraries remain sustainable and equitable, collaboration among libraries, copyright holders, and policymakers is important. Implementing balanced approaches, such as fair use frameworks, opt-out systems, and effective licensing models, will help create a legal and operational ecosystem that aligns with the evolving needs of users and rights holders alike. As Justice Midha of the Delhi High Court underscored, it is imperative to harmonise protection of copyright and the promotion of dissemination of knowledge. By fostering such an equilibrium, digital libraries can continue to serve as vital repositories of knowledge, supporting global access, innovation, and progress in the digital era.
