

---

## Copyright Risk Management for the Indian Academia

---

**Purnima Joshi**

Librarian

K. C. Law College, 123 D. W. Road, Vidyasagar Prin.

K. M. Kundnani Chowk, Churchgate

Mumbai – 400020, Maharashtra, India.

E-mail id: purnima229@gmail.com

■■■■■

*To bring forth the importance of copyright risk management for the Indian academia while elaborating on the various risk management procedures. Review of the legal and Library and Information Science (LIS) literature was carried out for identification of fair dealing issues. Judgments of different courts were cited for presentation of the practical aspects which were then evaluated along with the issues in order to identify risks. Findings – Copyright risk management has become a necessity and a need for appropriate policies, tools and strategies is observed. Administrative support is essential for integration of copyright compliance within all institutional activities. Various risk management strategies are suggested.*

■■■■■

Fair dealing; Copyright risk management; Copyright risks; Risk management.

■■■■■

The journal is available at [www.jalis.in](http://www.jalis.in)



Journal of Advances in Library and Information Science  
ISSN: 2277-2219 Vol. 6. No.4. 2017. pp.388-393

## INTRODUCTION

Economic and social development of a society depends on the creativity of its members. Creativity therefore, has to be encouraged for the progress of a society. Encouraging creativity is the primary objective of copyright law. It encourages authors, composers, artists, designers, architects, and computer software producers among others to create original works by rewarding their creativity with exclusive rights over their works for a limited period of time. These works may be scientific, literary or artistic in nature. The exclusive rights of creators, over their creations prevent other persons from availing themselves of these works by unfair means. This protection provided by copyright law creates an atmosphere conducive to creativity. Copyright law confers upon the owner a bundle of exclusive rights including moral and economic for reproduction of the work and other acts, which enables the owner to get monetary benefits. If any person other than the owner carries out these acts in relation to the copyrighted work without permission, then it constitutes infringement of copyright.

The use of creative works expands knowledge and furthers development in the field making the society stronger; hence it is necessary to maintain a balance between rights of the owner and the interest of the society. The Copyright Act ensures this balance through imposition of certain limitations on the exclusive rights. The Act has certain exceptions to promote free flow of information and ensure collective welfare of the society. These exceptions allow specific uses of the copyrighted material by persons other than the copyright owner. There are three categories of limitations and exceptions viz., limited duration of protection, provision of compulsory licenses, and allowing certain uses without specific authorization by the owner which is termed as “fair dealing” in copyright parlance (James, 2004). Copyright protects economic interest of creator for a specific period of time, which varies in different countries. The copyright expires after the end of the specified period, bringing the work in public domain. However, the commercial exploitation of the work once it is in public domain, does not amount to infringement. The law has provision for compulsory license to ensure that certain sections of the society are not deprived of the access to copyrighted works. For example, license for conversion of copyrighted materials into Braille. Compulsory licenses are non-negotiable. The law also allows provisions for use of copyrighted works

before expiry of copyright term without any authorization or cost. These are referred to as the fair dealing provisions. These provisions allow use of copyrighted materials for personal research and study; criticism and review; news reporting; judicial proceedings; and amateur performances to a non-paying audience. According to Harper and Row (1985) if the fair dealing is prohibited, "it would stifle the very creativity which the law is designed to foster".

The Indian Copyright Act, 1956 (Amendment 2012) does not define 'fair dealing', but fair dealing provisions in the form of exemptions are incorporated in Section 52 of the Act. Copyright implications on use of copyrighted material by libraries and their activities are not covered by the India's Copyright Act. Section 52(1) (o) has a brief reference to the public libraries, according to which, libraries may make three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library, if the book is not available for sale in India. In the case of *ESPN Star Sports v Global Broadcast News Ltd. & Ors.* (2008), the court opined that a 'rule of thumb' cannot be applied for all fair dealing cases. Each case should be dealt based on facts and circumstances. In the case of *Civic Chandran v Ammini Amma* (1996), the court held that even "substantial copying of copyrighted work is permissible under the fair dealing exception, if the copying is in public interest". In this landmark case, the three factors viz., amount and sustainability, purpose and character, and effect on the potential market due to likelihood of competition were applied to ascertain fair dealing in the matter.

Sharma (2009) observed the cautious and rigid approach of courts and concluded that the Indian copyright law did not define the 'role of fair dealing' due to lack of varied cases. As a result of this deficiency of case laws, the concept of fair dealing has remained unexplored and unrefined over the years. India still awaits that landmark case which will enable the judiciary to address fundamental issues about purpose, meaning and application of Indian law on fair dealing. The US and the UK Acts specifically mention the implications of copying by librarians, which is not defined in the Indian law, creating difficulty in decision making process. Thus, in a situation where the law is not clear and the courts have not had the opportunity to define fair dealing due to lack of cases, there is state of confusion amongst the stake holders in the academia. The study

by Olaka and Adkins, (2013) reported that the academic library users perceive all academic use as fair dealing. However, this widespread impression was proved to be erroneous by three landmark court cases involving fair use of published literary works viz., *Basic Books Inc. v Kinko's Graphics Corp.* (1991); *Princeton University Press v Michigan Document Services, Inc.* (1996); and *American Geophysical Union v Texaco, Inc.* (1995).

Kinko's Graphic Corporation assembled 'course packs' by photocopying excerpts from the reading materials prescribed by college professors and sold them to students for profit. Kinko's copied the material without permission or payment of license fees and claimed fair use stating that they were serving the needs of nonprofit educational institutions. However, fair use was denied due to extensive copying and commercial nature of the reproduction of copyrighted materials by a for-profit company in spite of the final educational use. In the year 1996, the fundamental reasoning behind the Kinko's judgment was reinforced in a similar case filed by Princeton University Press against Michigan Document Services, Inc., a commercial photocopy shop. Journal publishers alleged that employees of Texaco Corporation were repeatedly photocopying journal articles for archival purpose ad to avoid multiple licenses fee. Marley (1999) observed that these judgments impacted photocopying services. It resulted in reduction of photocopying in academic libraries and librarians started advising patrons to seek prior permission, to limit the number of copies and also to avoid accumulation of photocopies. Purchase of photocopying license was observed to be the effective way of managing copyright risks involving fair use.

In the recent case of *Cambridge Univ. Press v. Patton* (2014) dealing with educational fair use in the digital environment, the court opined that the case-by-case, or work-by-work approach to fair use is most appropriate to evaluate fair use in course packs. Though there are no Indian precedents for academic fair use, the recent case of three major publishers, Oxford University Press, Cambridge University Press and Taylor and Francis against Rameshwari Photocopy Services and Delhi University (Delhi University copyright case) (Chancellor, Master and Scholars of the University of Oxford and anr., 2016) is considered as a test case. The facts of this case are similar to the Kinko's and MDS cases. The judge did not find any infringement and so dismissed the suit in

favor of the defendants viz., the photocopy shop and Delhi University.

The Indian academia lauded this judgment. A popular belief that it has opened the door for full text copying of texts for education has taken root. However, Basheer (2016) and Agarwal (2016) assert that contrary to this popular belief, the ruling by the Delhi High Court does not permit unauthorized full text copying of books. Moreover, the photocopy shop had a contractual relationship with the University for creation of course packs. Thus, similar acts by other photocopy shops which have no such authorization from the concerned educational institute will have to be tested independently as they would be out of the purview of this judgment. The judgment was bound by the facts considered and therefore, cannot be regarded as a blanket permission to photocopy entire books. However, the judgment did not specify the upper limit of permissible percentage for photocopying. Hence if any other case dealing with permissibility of full text photocopying is presented to a Court, then it will be decided on the premise of whether full text photocopying is reasonably necessary for promotion of educational needs.

The academic publishers who were the plaintiffs in this case, went for an appeal against this judgment in Delhi High Court in front of a Division Bench of two judges. The judges reiterated the above thought in their judgment (Chancellor, Master and Scholars of the University of Oxford and ors. v Rameshwari Photocopy Services and ors., 2017). The case was referred back to the trial court. It was later withdrawn by the publishers in March 2017. The finer points of the judgment are not being understood clearly by the academia. In order to use copyrighted works ethically without any risk, the importance of copyright risk management should be recognized in India at all levels and due care should be taken while using creative works. As is observed above, there are two extreme approaches: at one end is an over cautious approach where any academic use is perceived as infringing and at the other end is the rash approach where all educational use is perceived as fair use. However, a judicious and informed approach needs to be cultivated in the Indian academia through education and sensitization.

### **COPYRIGHT RISKS**

Creation and use of content in print or digital format involves a variety of copyright risks as enumerated in the literature (Korn and Oppenheim, 2009; Harris,

2014; UCLA Library, 2015; Casey, Proven and Dripps, 2007) including:

1. Unauthorized use of third party materials
2. Inadequate identification of layers of copyright that may exist in the content, eg., different copyright for an image included in a copyrighted literary work
3. Lack of copyright notices and credit information along with the content
4. Inadvertently exceeding the permissions obtained for use of third party content while granting usage rights to users
5. Inadequate recording of permissions granted for use of third party content
6. Inadequate recording of rights that may require clearance
7. Inadequate recording of licenses granted to third parties to use content created indigenously
8. Expiry of license period
9. Breaching pay-walls of the digital content
10. Circumvention of technical protection measures attached to digital content either without authorization or under a copyright exception
11. Inappropriate license terms negotiations for providing access to content
12. Disputes among consortium partners over ownership of IP rights
13. Breach of IPR conditions in the consortium agreements
14. Lack of expertise in negotiating license terms
15. Lack of procedures to deal with copyright infringements
16. Inability to trace or find the rights holders of content to be used
17. Insufficient and non-diligent procedures to trace rights holders.

### **CONSEQUENCES OF COPYRIGHT INFRINGEMENT**

Copyright underpins almost all uses of creative content. If permission of the copyright holder is not sought for uses out of the purview of fair dealing, a penalty might be imposed on the infringer and the concerned institution. In several instances the possibility of a court case cannot be ruled out, resulting in humiliation and impaired reputation of the concerned individual and the institution. It will also result in increased stress for library staff and uncertain atmosphere in the library. Unauthorized use of subscribed / licensed content may also lead to discontinuation of access to the content. Thus, the

misdeeds of single person would affect the entire institute. It is the institution's responsibility to educate users about the terms and conditions of the license agreements for access and use. In case of violation of copyright and license terms by the individual users, the institution would have to face any or all of the above consequences. The onus of compliance is on the institution and not on the individual users.

### **COPYRIGHT RISK MANAGEMENT**

Copyright risk management is a key to copyright compliance. It should not be perceived only as a legal issue. Everyone involved with creative content should be concerned about copyright. Copyright considerations are an essential part of every step in research or academic projects. Smith (2012, p.18) opines that though complex, copyright is an issue of risk management and should be treated as other risks of legal liability encountered in libraries. He states that "a risk management approach will clarify the way in which the different exceptions and limitations in copyright law can work together to reduce the risk of conflict or liability". The copyright risks enumerated above can be mitigated through various strategies. It is possible that one or more strategies may be required to mitigate a risk and also a single strategy may be useful for more than one risk. The risk management framework designed by Casey, Proven and Dripps (2007) involved four stages viz., Identification, Assessment, Treatment (Response and Reduction), and Monitoring and Control. According to them, risk management should be embedded in the decision making process of an institution. Due consideration should be provided for copyright management for any new initiative, service or project, at its planning stage. Harris (2015) has provided a short six point check list of best practices for effective copyright risk management.

Fortney (2013) outlined the copyright risk management strategy employed by University of California Santa Cruz during digitization of the rare historical collection involving fan envelopes; photos; tickets and backstage passes; and posters. For all the collections, an assessment of likely risks and an evaluation of the strength of a fair use argument was conducted and documented. The rights management coordinator attempted to find accurate names and contact information for all copyright holders of the items in the collection. They were then contacted for signing a license. The contact information is provided in appropriate location on the website. In order to

unauthorized use of images, the easily downloadable images were stored at a size and resolution that rendered them undesirable for printing. Finer details of the scanned images could be seen only for one part at a time. Any questions or requests received regarding the collection were answered as promptly as possible. Many researchers have stressed on the development of suitable strategies for mitigation of potential copyright risks (Korn and Oppenheim, 2009; UCLA Library, 2015; Casey, Proven and Dripps, 2007; Stobo, Deazley and Anderson, 2013; Lipinsky, 2010; Smith, 2012; Korn, 2016). The strategies cover requirement for users, librarians and administrators:

#### **For users to ensure ethical use**

1. Developing standard copyright notices and credit information formats for third party as well as in-house generated content
2. Indicating the third party content or works through proper credit details
3. Displaying copyright notices at appropriate places
4. Incorporating rights and usage information on every photocopy, printout, ILL document, etc.
5. Incorporation of copyright statements and license terms along with the content
6. Use Policy Agreement about the institution's policy on copyright infringement for end users
7. Sensitization of and training for content creators and users

#### **For librarians**

8. Ensuring the consistency of license terms with the institutional policies on access and use of content
9. Ensuring compatibility between rights granted by third parties and those granted to the users of the content
10. Providing access to content that has been cleared for use through permissions
11. Restriction of access to commercially valuable content through passwords
12. Retention of documentary proof of the reasonable searches carried out for tracing copyright owners
13. Establishment of 'due-diligence' procedures in the institution for tracing rights holders
14. Provision of a disclaimer along with orphan works

15. Monetary provision for the eventuality of later discovery of the copyright owners of orphan works
16. Clear understanding of copyright issues and the severity of penalties for unauthorized circumvention of technological protection measures associated with digital content
17. Avoiding unauthorized sharing of copyrighted content with fellow librarians for even academic use by their clientele
18. Declarations in writing about copying by librarians and library staff
19. Creating a rights management database that describes the contents, the associated rights, permissions granted for use, and expiry dates of the permissions
20. Incorporating appropriate clauses in consortium agreements clearly defining ownership of the IP involved
21. Ensuring proper understanding and agreement of the terms and conditions with all consortium partners through their signatures before the work begins.

#### **For administrators**

22. Well defined formal copyright policy and procedures
23. Estimation of the possible associated costs as early as possible to facilitate budgeting for the project
24. Supporting librarians and library staff for identifying and clearing rights at the beginning of any project
25. Mechanism for investigation of complaints and reinstatement of the content if the complaint is found to be frivolous
26. A formal policy specifying the conditions for removal of infringing content, especially from an institutional repository
27. Establishment of rapid and effective notice and take-down procedures
28. Displaying information of contact person for reporting allegedly infringing content and the format for lodging such a complaint
29. Continuous staff training to keep them updated of new developments

For effective copyright risk management, copyright should be considered as an institutional issue for a longer term and not for incidental use. Appropriate policies, procedures and tools should be in place for identification, management and protection of rights. In addition, central storage of all the documents and

information related to rights management is essential so that they are available at all times for all concerned. The administrators must support and be actually involved in making copyright considerations a part of all stages of all institutional activities.

#### **OBSERVATIONS AND CONCLUSION**

It has been established that a 'rule of thumb' cannot be developed for all fair dealing cases. Each case depends on its unique facts and circumstances. For broadcasts, fair dealing threshold was fixed by the judge while in another case the judge refrained from fixing a threshold for photocopying and observed that the amount of copying should be justified by the purpose. Even substantial copying was found to be permissible if it was in public interest. These varying views adopted by judges lead to different interpretations of the various sections of the Indian Copyright Act. As more cases are decided, the understanding of fair dealing will become refined and the confusion of the academia will be cleared. The judgments will thus provide guidelines for managing copyright risks.

In addition to the pool of rich case laws, sensitivity of all concerned towards the issue of copyright infringement is also an important factor in risk management. However, it has been observed that Indian academia considers full text photocopying for educational purpose as non-infringement. A judicious and informed approach therefore needs to be cultivated through education and sensitization. Appropriate policies and procedures are also necessary for effective copyright risk management. Librarians have a vital role in copyright risk management. They are the facilitators of ethical use of copyrighted works through copyright education. Various risk mitigation strategies mentioned are the key practical solutions to manage risks. Proper consideration and management of copyright risks will ensure unhindered creative and research activity and result in contributing in the social and economic progress of the society.

#### **REFERENCES**

- [1]. Agarwal, P. (2016). Dispelling the myth that the DU photocopy judgment permits photocopying of entire books. Retrieved from <http://spicyip.com/2016/11/dispelling-the-myth-that-the-du-photocopy-judgment-permits-photocopying-of-entire-books.html> on 15-12-2016.

- [2]. American Geophysical Union v Texaco, Inc. (1995). Retrieved from <http://www.copyright.gov/fair-use/fair-index.html> on 7.7.2016
- [3]. Basheer, S. (2016). Copyright as exception: free competition and access to knowledge have been the default legal norm for many a nation. Indian Express, 2016, October 19, 13.
- [4]. Basic Books Inc. v Kinko's Graphics Corp. (1991). Retrieved from <http://www.copyright.gov/fair-use/fair-index.html> on 7.7.2016
- [5]. Cambridge Univ. Press v. Patton. (2014). Retrieved from <http://www.copyright.gov/fair-use/fair-index.html> on 27.7.2016
- [6]. Casey, J.; Proven, J. and Dripps, D. (2007). Managing Intellectual Property Rights in digital learning materials: a development pack for institutional repositories. Retrieved from [https://research-repository.st-andrews.ac.uk/bitstream/handle/10023/3288/TrustDR\\_Dev\\_Pak.pdf](https://research-repository.st-andrews.ac.uk/bitstream/handle/10023/3288/TrustDR_Dev_Pak.pdf) on 25.7.2016
- [7]. Chancellor, Master and Scholars of the University of Oxford and ors. v Rameshwari Photocopy Services and anr. 2016 (68) PTC 386 (Del)
- [8]. Chancellor, Master and Scholars of the University of Oxford and ors. v Rameshwari Photocopy Services and ors. 2017 (69) PTC 123 (Del)
- [9]. Civic Chandran v Ammini Amma 1996 (16) PTC 670 (Ker)
- [10]. ESPN Star Sports v Global Broadcast News Ltd and Ors, 2008 (36) PTC 492 (Del) para 34
- [11]. Fortney, K. (2013). Braving the present: experience and copyright risk assessment for digitizing recent historical collections. Retrieved from
- [12]. Harper & Row Publishers v. Nation Enterprises. (1985). 471 US 539 at 550
- [13]. Harris, L. E. (2014). Developing a copyright risk management plan. Retrieved from <http://www.copyrightlaws.com/copyright-basics/developing-copyright-risk-management-plan/> on 9.5.2016
- [14]. Harris, L. E. (2015). Best Practices to Lower your Copyright Risks. Retrieved from <http://www.copyrightlaws.com/international/copyright-compliance-and-management-lower-your-copyright-risks/> on 26.7.2016
- [15]. James, T. C. (2004). Copyright law of India and the academic community. Journal of Intellectual Property Rights, 9, 207-225.
- [16]. Korn, N. and Oppenheim, C. (2009). IPR toolkit: overview, key issues and toolkit elements. Retrieved from
- [17]. Korn, N. (2016). Copyright - Fifty Shades of Risk. CILIP Conference 2016, Brighton, 12-13 July 2016. Retrieved from <http://cilipconference.org.uk/presentations/> on 26.7.2016
- [18]. Lipinsky, T. A. (2010). Is my use lawful? copyright problem analysis and risk assessment. Retrieved from <http://www.nyheritage.org/sites/default/files/docs/CopyrightProblemAndRiskAssessment.pdf> on 25.7.2016
- [19]. Marley, J. L. (1999). Guidelines favoring fair use: an analysis of legal interpretations affecting higher education. The Journal of academic librarianship, 25(5), 367-371
- [20]. Olaka, M. W. and Adkins, D. (2013). Problem solving strategies that Kenyan academic librarians utilize when presented with copyright queries. Library Review, 62 (3), 118-133
- [21]. Princeton University Press v Michigan Document Services, Inc. (1996). Retrieved from <http://www.copyright.gov/fair-use/fair-index.html> on 7.7.2016
- [22]. Sharma, A. (2009). Indian perspective of fair dealing under copyright law: *lex lata or lex ferenda*, Journal of Intellectual Property Rights, 14, 523-531
- [23]. Smith, K. L. (2012). Copyright risk management: Principles and strategies for large-scale digitization projects in special collections. Research Library Issues, 279, 17-23. Retrieved from <http://publications.arl.org/rli279/17> on 25.7.2016
- [24]. Stobo, V.; Deazley, R. and Anderson, I.G. (2013). Copyright & risk: scoping the Wellcome Digital Library Project. CREATE Working Paper 10. Retrieved from <http://www.create.ac.uk/wp-content/uploads/2013/12/CREATE-Working-Paper-No.10.pdf> on 25.7.2016
- [25]. UCLA Library. (2015). Risk assessment guidelines. Retrieved from [https://www.library.ucla.edu/sites/default/files/Guidelines\\_RiskAssessment.pdf](https://www.library.ucla.edu/sites/default/files/Guidelines_RiskAssessment.pdf) on 25.7.2016