

Access to Digital Information: Facets of Law

Library and Public

- The primary function of libraries is to provide access to information
- The public have the right to receive information as a constitutional or fundamental right [Freedom of Speech and Expression]

Digital Information

- Libraries facilitate access to information – digital or otherwise.
- Digital information is the information that is available in digital resources – electronically recorded/ stored in any format/digital device – CDs, DVDs, smartphones, laptops, searchable databases and other online sources etc.
- Digitization is another form of recording /storing etc. information, but technology various devices and other resources involved. Comparatively far efficient and convenient.

Access

- It is roughly the freedom and ability to identify, obtain and use information in digital form
- Accessibility to technology as well as the ability to use it
- It is a FR and equitable opportunity
- Digital divide...
- Librarians may have to access and to enable the interested public to have access
- [Confidential and non-confidential information]
- In this process you may make the information accessible on line from any place at any time, from the library premises, by sharing, and through reproduction, public performance and public display etc.

Rights are also limited

- Right to access is not unlimited. [Educate your users as well on limitations]
- Main concern is the law of copyright [Intellectual Property Act No 36 of 2003 (As amended)]
- You deal, in many hours of your official life, with ‘copyright material’ belonging to others
- Digital technology and copyright are closely related and mutually influenced
- Try to play a balancing role between rights

Copyright Material – Literary and Artistic Works

- They are
 - (a) books, pamphlets, articles, computer programs and other writings;
 - (b) speeches, lectures, addresses, sermons and other oral works;
 - (c) dramatic, dramatic-musical works, pantomimes, choreographic works and other works created for stage productions;
 - (d) stage production of works specified in paragraph (c) and expressions of folklore that are apt for such productions;
 - (e) musical works, with or without accompanying words;
 - (f) audiovisual works;

Copyright Material – Literary and Artistic Works

- They are...
 - (g) works of architecture;
 - (h) works of drawing, painting, sculpture, engraving, lithography, tapestry and other works of fine art;
 - (i) photographic works;
 - (j) works of applied art; and
 - (k) illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science. [S.6]

Others- Derivative Works

- These are the works derived from, or based on, the pre-existing works. Like all other protected works, they receive copyright protection as ‘works.’ [S.7]
- There are two categories of derivative works – (a) transformations and modifications of works and (b) collections of works and mere data (databases).

Rights attached to them

- The word 'copyright' embraces a bundle of statutory rights that are generally known as 'protected rights'. Each of those rights can be exploited independently.
- They take two forms – economic rights [S. 9] and moral rights.[S. 10]
- While economic rights enable their owner to derive economic [financial] benefits from the work, moral rights attempt to safeguard the honor and reputation of the author as expressed in the work.

Rights attached to them – Economic Rights

- The owner of copyright of a work has the exclusive right to carry out or to authorize to carry out certain specified acts in relation to the work. By carrying out or authorizing to carry out them the owner may derive economic benefits. These ‘acts’ are therefore known as ‘economic rights.’
- They cover the entire work as well as a substantial part of a work
- They are exclusive rights in the sense that their owner can preclude others from carrying out, or authorizing to carry out, any of them. They are also exclusive rights in the sense that only their owner has the right to carry out, or to authorize to carry out, any of them. They are thus of both negative and positive nature
- They include ‘reproduction’ [making copies] etc.

Economic Rights

- **‘Reproduction’** has been defined as “the making of one or more copies of a work in any material form, including any permanent or temporary storage of a work in electronic form.
- ‘Reproduction’ has, therefore, received in this context a broader meaning covering the making of copies in any material form - traditional forms as well as novel forms including those emerged with the development of new technologies.
- Consequently, ‘reproduction’ occurs where the copies are made by, for example, printing, photocopying or digitizing a book or by photographing a painting. The copies produced by a computer or by transmitting or downloading of material from e-mail notice boards or Internet websites also fall within ‘reproduction.’ Any permanent or temporary storage of a work in electronic form has been expressly covered.
- ‘Reproduction’ is much broader than exact or direct copying of a protected work and covers many other acts of its use. An act of reproduction occurs indirectly, for example, where a work is derived from a protected work in form of ‘transformation’ or ‘modification.’

Economic Rights

- Translation
- Adaptation, arrangement or transformation
- Public distribution of the original of a work or its copies by sale, rental or otherwise.
- Rental
- Importation of the copies of a work. However, the importation of a copy of a work by a physical person for such person's own personal purposes without the authorization of the owner of copyright is permitted
- Public display of the original or a copy
- Public performance of the work
- Broadcasting of the work
- Other communication to the public ["Communication to the public" means "the transmission to the public by wire or without wire of the images or sounds or both, of a work, performance or sound recording including the making available to the public of a work, performance or sound recording in such a way that members of the public may access them from a place and at a time individually chosen by them."]

Moral Rights

- The right to have the author's name indicated prominently on the copies and in connection with any public use of the work, as far as practicable
- The right to use a pseudonym and not to have the author's name indicated on the copies and in connection with any public use of the work
- The right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the honor or reputation of the author

Economic rights- Limitations

- The protected economic rights are subject to certain limitations

Economic rights- Limitations- Fair Use

- It covers certain acts of unauthorized use of a work, which would otherwise constitute acts of infringement. Such acts of use are permitted because of the purpose underlying the use.
- “Notwithstanding the provisions of sub section (1) of section 9, the fair use of a work, including such use by reproduction in copies or by other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, shall not be an infringement of copyright.” [S. 11 (1)]

Economic rights- Limitations- Fair Use/ Factors to be considered

- The Intellectual Property Act does not define the expression 'fair use', but broadly permits, as stated above, acts of fair use. The decision on the issue whether a particular act of use is fair or not would largely depend on the involved facts. However, the following factors must, in terms of s. 11 (2), be taken into consideration in determining whether the use made of a work is fair or not.
 - (i) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
 - (ii) The nature of the copyrighted work;
 - (iii) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - (iv) The effect of the use upon the potential market for, or value of, the copyrighted work

Economic rights- Limitations- Fair Use

- These provisions are applicable to all the economic rights recognized under s. 9(1). The purposes of fair use referred to therein constitute merely a set of examples and not an exhaustive list. They are consequently open-ended covering any act of use performed to achieve a fair purpose.
- S. 11 (1) is almost a verbatim reproduction of s. 107 of the US Copyright Act. The relevant decisions of the US Courts would, therefore, be useful in understanding the concept of fair use and its parameters in Sri Lanka.
- Prior to the introduction of section 107, the US case law had solidly established the doctrine of fair use. The following opinion of Justice Story in *Folsom v. Marsh* (9F Cas. 342- C.C.D. Mass 1841) (No. 4901) – the first case on fair use in the US – demands reproduction. “In short, we must often, in deciding questions of this sort, look to the nature of the objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”
- *Maxtone-Graham v. Burtshaell* – carries, for example, the following observations. “As Justice Story observed, however, many uses fall somewhere in between two extremes. To evaluate cases falling in gray area, he proposed an inquiry into the infringer’s creative effort.” [231 USPQ 534 – 538 – 39 (2d Cir. 1986)]
- The United States Supreme Court’s recently issued [April 1, 2021] landmark copyright decision in *Google LLC v Oracle America, Inc.* for an analysis of ‘fair use’ in the US [finding that Google was not liable for copyright infringement when it copied 11,500 lines of code from Oracle’s Java SE computer program]

Economic rights- Limitations- Fair Use

- The U K law uses the term ‘fair dealing.’ [S. 29 of the Copyright, Designs and Patents Act of 1988]
- The following observations of Lord Denning in *Hubbard v. Vosper* [(1972) 2 QB 84 – 94-95] are often cited re. ‘fair dealing’ in the UK
- “It is impossible to define what is ‘fair dealing’. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, they may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.”

[Associated Newspapers Plc. v. News Group Newspapers Ltd and others (1986) RPC 515-518 (‘..,The question of fairness must at bottom depend upon the motive with which the protected material has been copied’. Also HRH the Duchess of Sussex v. Associated Newspapers Limited [2021] EWCA Civ 1810] - misuse of private information and infringement of copyright- public interest, freedom of expression and privacy, fair dealing etc.]

Economic rights- Limitations- Fair Use

- As far the public interests including the human rights are concerned, the defense of fair dealing does not defend the use of protected material for commercial purposes. The users may use, for example, a few words employed by the author for reporting current events, but not a bigger portion to attract readership. *Ashdown v. Telegraph Group Ltd* (2001) 4 All ER 666 – 685-p. 86.
- *HRH the Duchess of Sussex v. Associated Newspapers Limited*. Sir Geoffrey Vos, Master of the Rolls stated: “Most importantly, perhaps, the use made of the Letter was unfair, because it was not about reporting current events, but reporting the actual contents of the Letter to make the splash of publication already referred to.” He had earlier stated: “In my judgment, however, the judge understood that the nature and degree of the originality involved in a work can affect the availability of defenses such as fair dealing, public interest, and ... freedom of expression.” “The judge did understand the nature and degree of the originality involved in the Letter, and that it could affect the fair dealing defense.”

Examples of Acts of Fair use – S.

12/ Two relevant examples

- **Teaching purposes**

Permitting the reproduction of a published work for teaching purposes section 12 (4) provides:

- ‘Notwithstanding the provisions of section 9 (1) (a), the following acts shall be permitted without authorization of the owner of copyright: (a) the reproduction of a short part of a published work for teaching purposes by way of illustration, in writing or sound or visual recordings, provided that the reproduction is compatible with fair practice and does not exceed the extent justified by the purpose of such reproduction; (b) the reprographic reproduction for face to face teaching in any educational institution the activities of which do not serve direct or indirect commercial gain, of published articles, other short works or short extracts of works, to the extent justified by the purpose; provided that the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions; provided however the source of the work reproduced and the name of the author shall be indicated as far as practicable on all copies made under this subsection.’

Examples of Acts of Fair use – S. 12/ Two relevant examples

- **Libraries and archives**

With regard to the acts of fair use involving libraries and archives, section 12 (5) declares: 'Notwithstanding the provisions of section 9 (1) (a), any library or archives whose activities do not serve any direct or indirect commercial gain may, without the authorization of the owner of copyright, make a single copy of the work by reprographic reproduction –

- where the work reproduced is a published article, other short work or short extract of a work, and where the purpose of the reproduction is to satisfy the request of a physical person:

Provided that – (i) the library or archives is satisfied that the copy will be used solely for the purposes of study, scholarship or private research; and (ii) the act of reproduction is an isolated occurrence, occurring, if repeated, on separate and unrelated occasions;

- where the copy is made in order to preserve and, if necessary replace a copy, or to replace a copy which has been lost, destroyed or rendered unusable in the permanent collection of another similar library or archives; provided that it is not possible to obtain such a copy under reasonable conditions; and provided further that the act of reprographic reproduction is an isolated occurrence, occurring if repeated, on separate and unrelated occasions.'

Economic Rights- Other Limitations

- Unprotected material, particularly those including the areas covered under section 8 of the Act,
- Non-original material and materials of which the period of protection has lapsed,
- Trifle creative expressions such as titles of books and short slogans and
- Works which are contrary to public interests, may not attract copyright protection.
- [Moreover, Section 12A of the Act [Introduced under S. 3 of the Intellectual Property (Amendment) Act, No. 8 of 2021] helps the persons who are blind, visually impaired or otherwise print disabled to have access to the protected copyright material for educational and research purposes in particular.]

Unprotected material

- Notwithstanding the provisions of sections 6 and 7 of the Act that recognize the protected works, the following are not protected. [S.8]
- Any idea, procedure, system, method of operation, concept, principle, discovery or mere data even if expressed, described, explained, illustrated or embodied in a work. ['Idea' embraces not only 'ideas' but also such other areas as facts, information and thoughts.]
- Any official text of a legislative, administrative or legal nature as well as official translation thereof.
- News of the day published, broadcast, or publicly communicated by any other means. However, an item of news may be presented in the form of a protectable work.

Owner of Rights

- Moral rights – only the author
- Economic rights – author, but subject to certain exceptions. They are
- Works of joint authorship- The co-authors of a work of joint authorship are the original owners of the economic rights
- Collective works- A collective work is a work ‘created by two or more physical persons at the initiative and under the direction of a physical person or legal entity, with the understanding that it will be disclosed by the latter person or entity under his or its own name and that the identity of the contributing physical persons will not be indicated’. The physical person or the legal entity at the initiative and under the direction, of whom or which a collective work has been created is the original owner of the economic rights.
- Works created by employees- The economic rights in a work created by an author employed by a physical person or legal entity in the course of employment of such employee^z belong, unless otherwise provided by way of a contract, to the employer. ^z
- Works created pursuant to commissions- If a work has been created pursuant to a commission, the original owner of the economic rights is the person who commissioned the work, unless otherwise provided in a contract.
- Audio-visual works- The original owner of the economic rights in an audio-visual work is its producer, unless provided otherwise in a contract
- Assignee or transferee- The economic rights can be assigned or transferred. Upon the assignment or transfer of any or all of the economic rights, the assignee or the transferee becomes the owner of the right or the rights so assigned or transferred. [S.14]

Duration – Moral and Economic Rights

- Generally during the life of the author and for seventy years after the death of the author, but there are some specific instances....
- Rights in a work of joint authorship are protected during the life of the last surviving author and for seventy years after the death of such author
- In the case of a collective work, other than a work of applied art, and in the case of an audio-visual work, the economic rights and moral rights are protected for seventy years from the date on which the work was first published or, failing such an event, within seventy years from the making of the work
- In the case of a work published anonymously or under a pseudonym, the economic and moral rights shall be protected for seventy years from the date on which the work was first published. However, where the author's identity is revealed or is no longer in doubt before the expiration of this period of time, the general period or the period governing the works of joint authorship are applicable [S. 13]

Orphan Works

- The term 'orphan works' is used to identify the protected literary and artistic works the right holders of which - authors or publishers or heirs of the right holders etc.- cannot be traced or contacted. The issue that arises in this scenario is how to lawfully use such a work - for example, translating a book into another language. The use of a protected work without the authorization of the right holder is, though the right holder cannot be traced or contacted, unlawful. A user of such a work without authorization runs the risk of being held responsible for infringement of the rights attached to it.
- The law of Sri Lanka does not address this issue. The provisions of the Act such as sections 6, 7 and 9 ensure the rights of the copyright holders, irrespective of whether they can be traced or contacted or not.
- The use of 'an orphan work' is thus unlawful unless the particular act of use falls within one of the exceptions to liability including 'fair use.'

If infringed ..

- Civil litigation and remedies
- Criminal liability and punishment

Computer Crimes

- Be mind of the computer crimes as recognized under the Computer Crimes Act No.24 of 2007 including unauthorized access to computers [hacking]