

ONLINE PUBLICATIONS: IS IT THE 'WORLD OF IDEAS' OR THE 'WORLD OF COMMODITIES'?

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Abstract

Ownership creates right over the property and it can be considered as right in rem. If the property is intangible then the right of ownership over this virtual property becomes important to claim damages from the wrongdoer. Ownership of intellectual property is one of the most confusing and emotionally charged issues of the digital age. Thus the issues surrounding intellectual property in the digital space are emerging as the heated debate and pushing for updating laws to cope up with the upcoming changes. 21st century is defined as web century, where everything is connected with web technology and electronic medium. Today, what is needed in the printed form for copyright protection is also available or found only in electronic form, which raises questions in our mind as to "who owns what? What, exactly is owned? What rights does ownership convey? How to protect such rights? Is it reasonable for consumers to afford high priced subscriptions for these digital databases? and many more". There is rising demand of electronic databases from all students, researchers and teachers. With the technological advancement the use of internet and WWW medium for publishing articles, Research papers, Books, White Papers, Working Reports has been increased day by day. Many Publishers and Authors are making their material or views available online for the access to the global community, in keeping their economic interests and benefits in mind.

In this era of networked world of virtual spaces with no control over the appearance and location of their contents anything can happen with the simple 'click'. This lead to a huge risk of unlimited access and sharing of digital data to large extent, which negatively impact over the potential gain as well. In this changing world, information published digitally is prone to high threats of easy reproduction and losing economic value. Therefore, IP rights management becomes a necessity to regulate online publications and to prevent digital or Internet piracy. We are right now in red alert for securing the digitally available information to the users and preventing unauthorized use of the same by emphasising on the concept of 'Fair Use'.

Knowledge is not private property, but to promote the research and giving credit to the original piece of information it is needed adequate encouragement and incentives. There is a requirement of managing the balance between the

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author's economic interests and also the reasonability or justification for the consumers to pay heavy for accessing such protected materials. There is always a conflict between the economic gain and the academic interests, which this paper is aiming to deal. The authors are striving to bring out the mode for leveraging the intellectual property available in digital form to achieve its maximum value, without limiting access or hoarding ideas. This is an attempt to find out the way out of this contrast with consideration provisions from Indian Copyright Act and USA Copyright Act.

Key Words: Copyright, Publication, Online Publication, Moral Right, Fair Use, Legal Database

Introduction

The theme of this paper is to work out for the situation to bring balance between the copyrighted publication available at high cost to the public and the fair use of such publication for enhancing knowledge at fair and reasonable price without any much restrictions and liabilities as such. There is a confusion as to restricted path set for accessing online database, when there is only academic interest of the users still continues which our legal framework has not sorted out yet. Although there is a defence available for the fair use of the copyrightable material, still there is a practice of paying heavy charges for accessing any online published contents. It is still not clear that are the charges asked for the services provided or actually for accessing the copyrightable content available on the net. Any legal database like Manupatra, Indlaw, Heinonline, Westlaw, Juris etc are charging heavy amount for making the content accessible to the users?

No doubt, today even education has become a part of business, but still the fundamental reason behind the publication is to make the public aware about the information. Therefore, in any sense, is it ethical to have setting restrictions on the path of knowledge. Is it not restricting the right to information of every person? Is not when the ideas are available at free flow, then such ideas will be more promoted or supported? Users will develop their knowledge on the basis of paid data and will restrict their knowledge in the same provided boundary for other paying hands. Is this knowledge is now has become a commercial commodity than a symbol of Saraswati/Knowledge? What are we all paying for - ideas, knowledge, imaginations, creativity? All these are intangible, which cannot be seen, only can feel around. Is it true to say that Intellectual Property Rights is making everything possible under the sun commercialized. We need to find out answers from the copyright act and from the provision therein regarding the fair use defence.

What is Publication?

A publication is a piece of information, regardless of its format, that is made available to the general public, or to an identified public, either free of charge or for a fee. The following are some of the types of publications such as Journals,

Newsletters, Research papers, Discussion papers, Technical reports, Annual reports, Fact sheets, Manuals, Public accountability documents such as environmental impact statements and exposure drafts for public comment, Conference proceedings where the full text of presentations is provided, Databases of information for public access, Substantial ministerial and departmental speeches, Any document that would formerly have been published in print, Any document eligible for an ISBN or an ISSN, Every new edition/version of any of the above (this does not include minor changes), Web sites or parts of a web site, which provide substantial, unique information about an initiative, project, event or subject area.

What is Online Publication?

All such representations which are available in networks or server in the form of written text are considered as online publication. The examples are e-books, e-journals, digital representations, music files and websites.

In digital publication, students and researchers use various types of resources for enhancing their knowledge. The following are some of the resources which are supplied in the e-learning process of education:-

1. Creating the Databases of Library catalogues.
2. Providing links for online available contents
3. Procuring reference sources
4. Subscribing and accessing Bibliographic database
5. Subscribing and accessing Full text journals
6. Providing links to important websites
7. Digitization of newspaper prints
8. Digitization of the resources generated internally in the institutes.

Many of the referred sources or other digital sources are used by the researchers for their studies purpose. While doing so, researcher usually faces problem of extra expenditures in availing the benefits of online publications, which are also essential part of research. In many cases, universities assist the students to conduct research by subscribing for such paid databases for student use. By this, direct financial burden does not come on the head of the student. But many universities are still there which are unable to provide such facilities or benefits to their students. Thereby, such students are not able to attain adequate assistance from the university and fail to achieve the target of doing quality research.

The high subscription charges for accessing online publication can be also one of the reasons for such failure. It is quite proper to understand that in the world of Intellectual Property Right, ownership of the creation lies with the creator, and if someone is utilizing such creation for his/her purpose, then the

owner deserves to receive remuneration or at least credit for his ability to innovate. But such encouragement should not in turn discourage researchers for continuing with their research activity in any manner.

What is E-Publication?

E-Publication is known as publication through use of internet or can be considered as publication of digital version of traditional print material like books, journals, thesis and bibliography with the help of electronic devices like software, mobile phones, compact disks and pen drives etc.

The term electronic publishing has been defined in many ways such as any non print media material that is published in digital form to an identifiable public. The media in an e-publishing can be text, numeric, graphic, diagram, charts, still or motion pictures, sound, video, or as is frequently the case, a combination of any or all of these.¹

The following are some of the important types of E- Publication:

1. Electronic Books (e-books)

The Oxford English Dictionary defined the e-book as a hand-held electronic device on which the text of a book can be read. In other words, we can say that a book whose text is available in an electronic format for reading on such a device or on a computer screen. Simply speaking, e-book is a book whose text is available only or primarily on the Internet. It encompasses any electronic/digital text that is book-like in nature and that can be read on some form of computer – whether desktop, laptop, handheld or a specialist form known as an e-book reader or e-book device. It has been suggested that it is not limited in content or form or structure; nor by virtue of its origin. With the use of the Internet and the World Wide Web increasing day by day, it is not surprising that many e-books are uploaded on the internet for public access and can be easily downloaded by a simple click.

2. Electronic Journals

E-journals are like global information highways, so these are being added to library collections at exponential rates. Libraries are doing extensive work to make e-journals available to their users and keeping them abreast with latest developments in their field of interest. E-journals are accessible either free against print subscription or for a nominal charge along with the print subscription. Access to e- journals is generally provided either by the publisher or through their aggregators. E-journals have provided excellent opportunities to access scholarly information, which were previously beyond the reach of libraries due to geographical constraints. E-journals possess many added features for the facilitation of libraries and its user community. These offer concurrent access to the scholarly content for multiple users. So these are boon for a huge campus where there are hundreds of users with many departments. Other features of e-

journals include full-text search, multimedia facilities and hypertext links. Text search is much easier and less cumbersome. E-journals also include multimedia and graphics to attract readers. Also the hypertext available in the e-journals will directly link to the areas of greatest interest and results in creative reading. Maxymuk (2004) highlighted that advantages of electronic journals include no physical space required and accessibility from almost any workstation that can be connected remotely to the institution's network. Thus e-journals can be accessed round the clock across geographical barriers, which make e-journals omnipresent. The most fortunate thing about e-journals is that both libraries and users can conquer the problems of missing issues and delay in receiving the issues. It can be clearly said that e-journals are truly a dream come true both for the librarians and users. Consequently libraries are now persuaded to subscribe to e-journals from a vast variety of publishers and providers.

Various names of e- journals are Online journals, Electronic serials or e-serials, Electronic periodicals, Zines or e-zines or webzines, Digital serials or d-journals.

Development of E-publication

With the start of decade of 1990 there was boost to electronic publication and thus it can be considered as new e publication era and birth of new information age. With the growing information industry there is growth in the collection of information, distribution of information and segregation of it as search engine has become very big business. Many new players like Hein online, J-stor, Manupatra and many other appeared on the screen of e- publication with the older and larger players like Lexis and Westlaw and picture of online publication has changed. With Lexis and Westlaw and others placed in every law school, and each law student trained in using online systems and given free use of very high quality material and it has converted the online publishing into booming industry. Knowledge and Research articles become economical viable and valuable. As Ken Svengalis notes, "In sharp contrast to 1977, when at least 23 legal publishers of some size and reputation were separately owned (along with scores of smaller ones), today the bulk of publishing resources are under three major corporate umbrellas: the Thomson Corporation, Reed-Elsevier, and Wolters Kluwer."² The changes in legal publishing have been fast and furious so that it is difficult to recognise who owns whom without a programme. The law book industry is always in demand as the facets of law are changing with change in society. One does not wish to romanticize what was always a business. Legal information companies always cared about profits and bottom lines. But when the smaller, older companies played key roles, legal information was viewed as special, and it was treated as such. While many of the current managers of the remaining companies also have deep roots in the publishing business, they report to much larger entities, and often operate within much larger financial contexts. Legal information has become a commodity. Moreover, the changes in legal publishing are taking place on a global scale. Why does this matter to the

typical legal researcher? Does anyone really care who produces the information? Whether this monopoly is becoming hurdle in legal research? How a poor legal student from remote area can access this paid information without any financial support?³

Concept of Copyright and Fair Use

As we know, that Copyright is a right given by the legal framework to the creators of original literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. In fact, it is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work. There could be slight variations in the composition of the rights depending on the work, but still copyright subsists.

The Indian Copyright Act confers copyright on (i) original literary, dramatic, musical and artistic works, (ii) cinematographic films and (iii) sound recordings. The word 'original' means that it should not be copied from other works or alternatively it should be the outcome of independent efforts. The Act empowers copyright holder(s) to do or authorise doing a number of activities. The important among these are:

- a. to reproduce the work in material form
- b. to publish the work
- c. to perform the work in public or communicate it to the public
- d. to produce, reproduce, perform or publish any translation of the work
- e. to make any cinematographic film or a record in respect of the work
- f. to make any adaptation of the work
- g. to do, in relation to a translation or an adaptation of the work, any of the acts specified to the work in sub clauses to (a) to (f).

The grant of copyright is a limited monopoly. It is limited in the 'scope' of the rights granted and in terms of 'time'. In India, copyright on a literary work is provided for the lifetime of the author plus sixty years after his death. In case of joint authorship, the sixty years period is calculated from the beginning of the calendar year following the year in which the last (surviving) author dies. Copyright with respect to photographs, cinematographic works and sound recordings spans for 60 years of its first publication. In order to strike a balance between the society's need for access to knowledge and the need to rewarding creators, limited uses of copyright protected works are permitted without authors consent. These are called 'fair use' of copyright.

Section 52 of Indian Copyright Act permits certain activities which do not amount to infringement. Important in this 'exception list' are reproduction of literary, dramatic, musical or artistic works for educational purposes, e.g. research, review etc., and reporting in newspapers, magazines and periodicals

etc. It allows for the use of copyrighted material by the researchers for the academic or research interest.

The Copyright Act of India provides right-holders a dual legal machinery for enforcing their rights. The enforcement is possible through (1) the Copyright Board and (2) the courts. Legal remedies include imprisonment and/or monetary fines - depending upon the gravity of the crime. Sometimes remedies also include seizure, forfeiture and destruction of infringing copies and the plates used for making such copies.

The 1984 amendment has made copyright infringement a cognizable non-bailable offence. Under the provisions of the Act any person who knowingly infringes or abets the infringement of copyright is considered as an offender and is punishable with a minimum of six months imprisonment which may extend to three years and a fine between fifty thousand and two lakhs rupees.

Section 107 of the U. S. Copyright Act of 1976 establishes the affirmative defense to copyright infringement of "fair use." The act does not offer definition of "fair use," however; it enumerates four broadly worded factors that courts "shall" consider in determining whether a use is "fair" and thus noninfringing. They are (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copy- righted work.⁴ In fact the last part is mostly related with the authorization by the author and distribution of the copyrighted material. While extrajudicial and structural limits to copyright are under attack, fair use law has been realigned around transformative use, in which the user does more than simply copy the original work.⁵

The Doctrine of fair use is an integral part of Copyright law. It permits reproduction of the copyrighted work or use in a manner, even without the permission of the author, which would not amount to infringement of copyright. The fair use defense exists to encourage the creation of original works.⁶ The Supreme Court in USA held that transformative uses add new material that reflects critically on the original work and they are favored under the first factor and also are assumed to be less likely to damage the copyright owner's markets.⁷

Protection of Online Publication Under Copyright Act

Bring a literary work, online publication is protect-able under the copyright. Whilst copyright does not protect ideas, it will protect them once they are fixed in material or tangible form. For example, an idea for a story will not be protected by copyright, once the idea is transferred into writing, then it will be protected by copyright. Likewise, the concept for a website will not be protected by copyright, but as soon as the concept is noted down and/or the code for the website is written, then both the written concept and the website itself will be protected by copyright. The contents available on net are actually present in the

server and does not have any fixed prints on the concrete substance, but it can be printed out anytime on the sheet of paper and further there is the involvement of the creativity for writing such contents, hence the copyright is available to protect the contents on the net.

Copyright is granted to the author of such contents published on the net. He is entitled to freely and exclusively exploit their work, whilst granting or refusing permission for others to copy their work in different ways. These restrictions are permissible because of the ease reproduction of online data through the server. Therefore, copying the work, distributing copies of the work to the public, renting or lending copies of the work to the public, communicating the work to the public, adapting the work, (for example, translating, adapting or abridging a work), performing, playing or showing the work in public, broadcasting the work (which can also include electronic transmission) is permissible only with the permission of the author and further payment of royalty. Author's moral rights⁸ are also taken into account in order to sustain respectability towards his/her work.

Battle between Author and E Publication

Increasing demand from law schools and growing technology created new debate among authors and publishers. E-publications are becoming new battleground for freelance writers and publishers, with each group seeking the rights to use existing works on these publications. Although publishers ordinarily have the rights to use preexisting content produced by their staff writers under the work-made-for-hire doctrine,⁹ authors are sometime not aware about their rights. The usage of their works totally depends on the contracts made by them with the publishers.¹⁰ The issue was aroused in USA court in *Tasini v. New York Times*.¹¹ In the case of *Tasini*, ten freelance writers filed a suit against five companies: The New York Times Co. and Times Mirror Co., both newspaper publishers; Time Warner, a magazine publisher; Mead Data Central, then owners of the LEXIS/NEXIS database services; and University Microfilms, an issuer of CD-ROMs of periodicals. The writers claim that their work was republished on online computer databases and CD-ROMs without their consent. On one side of this dispute are the freelance authors. They consider themselves to be "modern day sweatshop workers" who scrape a living with low salaries and no benefits. They believe that they are entitled to the rights to their works on new media, which would enable them to license the works to the original publisher, if they choose, for reissuance on the electronic media. On the other side are the publishers, who claim that they were granted the rights to use the works when those works were originally conveyed. The publishers deny that electronic rights, or any rights to use a work on a future technology or new medium, must be granted explicitly and separately. Despite their differences, both sides agree on one point: this issue "will have wide-ranging consequences for the publishing industry no matter which side prevails."¹² But in this debate one issue has not been touched since long and it is the issue of the reader or customer who uses or

utilizes this publication. The purpose and commercialization of the art is to be considered while evaluating the fair use of copyright. How much amount of subscription goes to the author? If authors are getting some amount then how it is evaluated? If the commercialization of the research article or knowledge is used by unfair means to make economical gain at the cost of growth of research or innovation then it is the need to rethink the law. Law is not weapon but it is a tool used to prosper the society and betterment of mankind.

Obstacles under Copyright for Academicians

The concept of fair deal has not been properly used for the interest of the academicians, students or researchers to enhance their understanding and knowledge towards the available copyrighted material on net. As we have seen today that almost all the online databases are paid or subscribed for accessing the contents therein. Such websites has commercialized the contents for encouraging the efforts of the authors. Actually, in place of putting creative words, authors have begun to work for the commercialized words in order to attain economic gain. Though copyright gives protection and encouragement to the authors it creates monopoly of creators and publishers over these rights. Thus it restricts the user especially researchers, students, professors and knowledge seekers to taste the beauty of the literature. Further, by providing authors and copyright owners with exclusive control over uses of the work, the commercial value of the work increases as works cease to be freely appropriable by the public in search of knowledge. Academic and scholarly communities, start-up businesses, social and cultural activists, and technology developers note the chilling and unwelcome effect of the copyright market on innovation and progress. It is not wrong to say that Copyright does not support the academic interest despite of providing fair use as a defence. The ordinary lay person on the street will have difficulty in understanding the need to "clear rights" before using a copyrighted work.¹³ As a result of the conception of literary and artistic works as business assets, rather than creative expressions, copyright owners are today inclined towards exercising exclusive control over these works through law enforcement and technological protection measures to the extent that public access to these works many times becomes very difficult, if not impossible.¹⁴

What if progress of the sciences and the useful arts however, means holding authors to a higher standard of authorship and creativity, and encouraging authors to undertake a moral responsibility towards the advancement of knowledge for society? What if we remove the economic lenses through which we have conventionally looked through to understand the copyright system and market theory, and replace them with fresh lenses of ethics and moral philosophy to understand an institution with a goal of advancing knowledge in a completely different light? With an age-old philosophy to provide a novel vision for contemporary analysis, will we eventually arrive at a different, more workable solution to promoting the progress of science and the useful arts for society's benefit today?¹⁵ A more cohesive rights based system for authentic

authorship is surely more conducive to the question of literary independence and integrity than a system of ad hoc statutory rights and economic incentives, which forces most authors to surrender their authentic expressions to public tastes in order to receive remuneration for their works, and, which direct the production and dissemination of literary and creative works towards segments of society willing to pay the most for the work.¹⁶ While the market is important to provide a source of remuneration to authors and creators, authorial and artistic integrity in a work of authorship has a more significant bearing on how we progress, develop and improve as a society.¹⁷ After all, we should not forget about the public's right to information which is the right for everybody to use freely a piece of information to exercise a freedom guaranteed by law. It is pertinent to mention that the right to information is also the right to obtain information about a work which is protected by copyright, the right to be informed about the work and its content. As copyright only protects the form of the work, the contents of the work does not become a part of it and also the conflict arise when we interlink forms and content of the work. Copyright is available only on the expression as a whole, and not on the parts of such expression.

The copyright act protects the form used by a user to express the content of the literary work. Publisher, online or other, which publishes the articles, judgments, essays have right to protect the form of that work. They can not claim the contents, and they are not claiming, but still how can they charge enormously for their publication? Digital databases, online journals, online databases are charging hefty amounts which are not affordable to the educational institutions in rural part of India. Basically the articles or the more about the judgments delivered by High Courts and Supreme Court can be considered as public documents and can be seen by any person. Then does it not become the public's right of information and if it is a right of public then can these publication are allowed to charge heavy subscription? While considering public right to information, it has to be considered the freedom of communication, as it does not only concern communication but also the addressees of communications, who are the readers, the listeners and the viewers.¹⁸ They are ready to appreciate the work more than anything and what else an author need ultimately, 'praises for his/her work'.

Suggestions and Conclusion

The authors of the book or painters of paintings will get remuneration if they can sell their works in the market. However, if the author has got a good patron his literary and artistic production will get broader and varied audience and thus his work capture a large area and thereby he can get popularity and name. The copyright law is nothing but to secure the rights of these persons by way of legal patronage which help them to get remuneration for their creativity and productivity. Authors sell their work to a reading audience, who pays the author the market value, economic theory seeks to encourage authorship by the promise of market rewards, and through the market and thus authors are remunerated for their creativity. Statutory rights ensure that market rewards are appropriable.

At the same, copyright also proposes to enhance the world of knowledge and bring out more progress in science and other fields. Academicians, researchers and students are the players who actually cement the bricks to construct the universe of knowledge. The role of fair use proviso plays a very pertinent role in aligning the monopoly rights secured under Copyright with the academic oriented rights. But still, this provision fails to support the system in the manner as expected. Online publications are demanding high charges for making the contents available to the public. The users are made to pay hefty amount for their research work. This itself bring out the clear picture of non-effect of the fair use provision as such.

It is suggested that the copyright law should bring the balance of academic use and commercial use in such a manner that wherein no one has to pay a high/hefty price for the available contents on the subject than required or necessary to award the author. The objective should be to preserve the knowledge for the society to benefit with and not just to sell it off simple. It is more than a commercial commodity which just not suits the richly class/group but also is equally served to every person who has academic interest. The research should prosper and should not be restricted or placed any legal boundaries for commercial gain.

Copyright is not the subject-matter of any trade or business. The sole reason of introducing such a protection is to mainly encourage authors by giving them recognition for their work. But this objective is highly bent towards the economic goals of the authors and the work has been made a commercial thing which is only created for the purpose to sell. Do you think that the approach of making literature a commercial product is proper or will this work to enhance the knowledge of our society. Do we not deserve the free flow of knowledge from all the ends? Are we not restricting or closing the doors for receiving the ray of enlightenment. Is everything is just for sake of money, business and economic gain? What about the social development, which we all cherish with us for being a human. Is this moral responsibility does not have any say? We need to look for actual solutions for all these. Let's not create any dummy impression that our legal framework is safeguarding the academic or research interest. Infact, we are also contributing somewhere by not raising voice on the question of creating monopoly boundary around our well cherished literary world, when the grabbers are not the thieves.

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5. See, e.g., *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 484 (2d Cir. 2004) (Jacobs, J., concurring).
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9. See 17 U.S.C. ? 101 (1988) It defines a "work made for hire" as, in part, "a work prepared by an employee within the scope of his or her employment"); MARSHALL LEAFFER, in his *UNDERSTANDING COPYRIGHT LAW ? 5.2[A]-[B]* (1989) describes that the employer is granted all rights unless a written agreement between the employer and employee explicitly states otherwise. A work made for hire may also be "a work . . . commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."
10. The contract between the parties may convey the copyright in whatever manner the parties choose. See ROBERTA. GORMAN, *COPYRIGHT L AW* 5 2-53 (1991) (discussing copyright assignments and licenses).

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16. In his book, 'Not Just for the Money' Frey (1997) has explained an economic analysis of intrinsic and extrinsic motivation of creative artist. Intrinsic motivation is an inner drive and which gives an artist inner satisfaction, fame and recognition etc. Extrinsic motivation refers to financial reward. In his crowded out theory he stated that an inappropriate type of reward could have the opposite of the desired effect.
17. Justice O'Connor, said in his judgment that "public will not be permanently deprived of the fruits of an artist's labors", in *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 429 (1984), quoting *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948).
18. French Constitutional Court, Decision 84-181 D.C., 10-11 October 1984, R., 73.