LICENSING OF DIGITAL RESOURCES: A COMPARATIVE STUDY

Amit*

The preservation of digital publications involves various technical, legal, economic and organization issues. Copyright law and licensing arrangements may prevent problems for libraries that wish to preserve digital resources in the long-term or even short term. The complex nature of digital publications and new publishing models present various problems including resource intensive rights clearance and reliance on publishers to continue to provide access and preserve digital publications. There is a need for research to clarify issues identified in the preservation and legal literature and to provide a clearer picture of the activities and perceptions of stakeholders in digital preservation, including authors, publishers and libraries.

Introduction

The preservation of digital publications is an increasingly high profile issue. Digital preservation is challenging on a number of levels including various technical, legal, economic and organizational issues. Copyright has always been an issue in the development of digital libraries; copyright legislation in many countries was not designed with the digital environment in mind. Acquiring, managing and providing access to digital information in libraries involves making copies, which is rarely the case with more traditional library material.

Libraries have supported multiple formats for decades. But the newest medium, digital transmission has presented a wider scope of challenges and caused library patrons to question the established and recognized multi format library. Within the many questions posed, two distinct ones echo repeatedly. The first doubts the need to sustain print in an increasingly digital world, and the second warns of the dangers of relying on a still-developing technology. With the advent of the Web and the proliferation of electronic information, law librarians are more frequently confronted with questions from their administrators and patrons on the present and future value of the printed book. Technology and its advantages—convenience, cost, and timeliness—present an appealing future. So why libraries would continue to stock their shelves with printed texts, and why should their parent institutions provide space or funding for such acquisitions?

The answer is surprisingly begins with the library's mission to meet current and future user needs. This rapidly changing technological environment contains inherent future risks for researchers and academic libraries. The creativeness that spawns advancement and development also slows or prevents the adoption of stable standards in format, laws, and pricing. An environment that blossomed

* Amit, Indian Law Institute.

under constant change does not react well to restriction, and tying research or development to a particular standard would result in stagnation. Without such standards, though, a library cannot guarantee the preservation of information for future generations, and may even be frustrated in its goal to provide continued access to the current generation.

The world of information gathering is in transition, and users have shown a marked preference and reliance on a technology, which, if not stable, will undoubtedly continue to thrive. Libraries, as information brokers, cannot reject data simply because it fails to comply with existing expectations or because its format of transmission is not yet fully developed. Instead, they must seek to harness its strengths and to educate users on its weaknesses.[1]

Changing Standards and Preservation

Changes in computing technology have made both the media and the technical format of old digital materials less usable. Keeping digital resources accessible for use by future generations will require conscious effort and continual investment.

Ownership versus Licensing

Licensing brings with it a host of complicated issues. Today many electronic products are licensed. A library has access to licensed contents only so long as it maintains and pays for a subscription. It plays a significant role in the analysis of the long-term value of a resource to a library. Use of licensed database is governed by contract which limits the access. Licenses have mere temporary access. Libraries can lose access to many years' worth electronic resources when a license is not renewed.[2]

Archiving

The problem of preserving digital information cannot be solved definitively. Electronic documents are not self-perpetuating. Unless contents are actively backed up, consistently converted to current technologies, or both, an e-resource may not be accessible by tomorrow's user. Until standards are reached on issues such as archival responsibility and methodology and format preservation, electronic-only collections jeopardize a library's long-term obligations to build and maintain a usable collection.

United kingdom copyright law

Current legislation in the UK provides limited exceptions to copyright called "library privilege". If a copy is made directly by a user for one of the permitted purposes in UK copyright law, it is known as *fair dealing*. It essentially allows limited copying provided it is 'fair'. The amount that may be copied is normally interpreted as being no more than 5% or one chapter of a book or one article from a single issue of a journal provided it is for research, for a noncommercial purpose or private study. Known as *library privilege*, the

Copyright, Designs and Patents Act, 1988 allows certain prescribed libraries and archives to make a single copy for non-commercial research or private study on behalf of its users. The British Library can provide a copy for this purpose either on site in Reading Rooms or remotely using the Document Supply services providing the user signs a declaration form stating they are adhering to copyright regulations. Remote users must order through a third party library, such as a public or university library, who collect and keep the signed declaration forms.[3]

Canada law

The law of copyright also applies to the Internet, and so most individual works found there are protected: using Internet text or graphics without the permission of the copyright holder, for instance, is an infringement of copyright law. However, under its "fair dealing" provisions, the Copyright Act does allow individuals or organizations to use original works without such use being considered an infringement: criticism and review, news reporting, and private study or research (section 29). The Act also exempts certain categories of users, such as non-profit educational institutions under section 29.4.[4]

Australian laws

Copying may also be done in certain instances without infringement of copyright when done by libraries and archives for students, researchers, Members of Parliament and for other libraries. Copying of unpublished works and certain audio-visual materials for certain other purposes may also be done without infringing copyright.

Certain educational institutions and institutions assisting persons who have a print or intellectual disability may make multiple reproductions and communications of works for educational purposes or for assisting people who have a disability, under a license set out in the Copyright Act (a statutory license). Such statutory licenses give the copyright owner a right to be paid equitable remuneration through an approved collecting society.

Educational institutions and institutions assisting people who have a disability may for educational purposes, or for the purpose of assisting people who have a disability, also copy television and radio broadcasts, under statutory licenses. Again, the licenses provide for a right for copyright owners to be paid equitable remuneration through an approved collecting society. These licenses also extend to communication within the institution by electronic means.[5]

Indian law

Section 52 of copyright act provides some exception to infringement as for the private use and research and criticism and review but not of computer programs. For computer program it provides exceptions as in case of emergence or for non commercial use under sub-section (aa) and (ab). However, in sub-

sections (o) and (p) it provides limitations to library and private users that they can make copies if such work is not available in India.[6]

In copyright amendment bill 2010, there are some materialistic changes with respect to libraries. The first important amendment is insertion of section 2 (fa) which excludes rent acquired from non-profit libraries and educational institutions for a work or computer program from commercial rental. The word library is substituted by non-commercial public library in section 52 of the aforesaid act.[7]

US Laws

Copyright law has always sought to strike a balance between protecting the interests of authors and providing access to these works by the public. To this goal, US copyright laws have accorded to public libraries certain exemptions to the exclusive rights provided to copyright owners in section 106 of the Copyright Act.[8]

In 1976, Congress, as part of its general overhaul of the 1909 Copyright Act, created a purposeful scheme in section 108 to limit some of the exclusive rights accorded to copyright owners in section 106 in recognition of the "significant changes in technology" that had impacted the operation of copyright law. Congress sought to update the law to meet the challenges that "new methods for the reproduction and dissemination of copyrighted works" had presented. In terms of libraries, this meant recognizing the impact of photocopying on the notion of fair use and the necessity for libraries to be able to reproduce copies for archival purposes. Thus, section 108(a) provides that "notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment to reproduce or distribute a single copy or phonorecord of a work . . .," so long as the copy or distribution is (1) not made for commercial advantage; (2) the library is open to the public; and (3) the work includes a notice of copyright.[9] Subsection (a) thus sets out who may claim the section 108 exemptions and under what circumstances.

1. Reproduction for Preservation and Replacement

Sections 108 (b) and (c) address the purposes libraries have for invoking the exemptions. Subsection (b) pertains to unpublished works and allows libraries to make three copies of unpublished works for the sole purpose "of preservation and security or for deposit for research use in another library or archives. As originally written, subsection (b) allowed only a single copy of the unpublished work, but the Digital Millennium Copyright Act (DMCA) increased this limitation to three duplicates for such purposes.

Sub-section (c) addresses the reproduction of published works made solely for the purpose of replacement if a published work is damaged, deteriorating, lost, stolen or if the format in which it is stored has become obsolete. In order to use this provision a library must first make a reasonable effort to locate a

replacement copy available at a fair price. If no such replacement copy can be found, then the library may reproduce the published work.

In both subsections (b) and (c), the format allowable for duplication originally meant "in facsimile form," (e.g. photocopy, microfilm). The DMCA amendments changed this limitation in regard to duplications made for both preservation and replacement purposes to include the making of digital copies.

2. Reproduction for Library Patrons

Sub-sections (d), (e) and (g) address the need for libraries to make copies and distribute works to their patrons, and to patrons of other libraries via interlibrary loan systems. Under subsection (d), a library can make copies and distribute limited portions of a work from its collection or from that of another library when a patron requests no more than one article or other contribution to a copyrighted collection or periodical. Subsection (e) allows a library to copy and distribute entire or substantial parts of a work if requested by a patron when the copyrighted work cannot be obtained at a fair price. Under both provisions, the library presumes, unless it has notice otherwise, that the copies provided will be used for private study, scholarship or research, and that the copy provided becomes the property of the patron. Subsection (g) simply recognizes the need for interlibrary loans by codifying a library's right to participate in interlibrary loan arrangements as long as the purpose or effect is not to substitute for the subscription to or purchase of works.

3. Libraries and Fair Use

Another limitation on the exclusive rights of copyright owners of importance to public libraries is the fair use exception provided in section 107. Section 107 exists as both a "privilege" and an affirmative defense to a charge of infringement. Under section 107 it may not be an infringement of copyright to reproduce works for the purposes of criticism, comment, news reporting, teaching, scholarship, or research if such use is considered fair. The determination of when a particular use is considered fair depends on the following four factors:

a. The Purpose and Character of the Use

The analysis of the use under the first factor includes whether the use is commercial in nature or for nonprofit educational purposes. In *Sony Corp. v. Universal City Studios, Inc.*, the Court indicated that any copies used for commercial or profiting purposes are presumptively unfair.

b. The Nature of the Work Being Copied

Under the second factor the Court looks to determine the "value of the materials used. In applying this factor, the Court has pointed out that "use is less likely to be deemed fair when the copyrighted work is a creative product." Copyright protection on factual works is limited to the expression of the work.

Facts are not protected and therefore under the fair use analysis, a copy of a work that is fact-based is more likely to be considered fair use.

c. The Amount and Substantiality of the Portion Being Copied in Relation to the Work as a Whole

In applying the third factor the Court has considered not only the amount copied in relation to the whole, but also the qualitative value of the copied material. Therefore, if the amount copied is less than substantial to the whole, a court may still find the use to be unfair if what is copied can be considered "the heart" of the material.

d. The Effect of the Use on the Potential Market for or Value of the Copyrighted Work

The fourth factor (in concert with the first) tends to be where much of the Court's focus is in making determinations of fair use. In *Sony*, the Court held that in the case of a non-commercial use, the plaintiff must prove that there is a meaningful likelihood of future harm to its potential market. However, if the use is for commercial gain, the likelihood of harm may be presumed. The *Sony* test has been applied in fair use cases going forward.

In the library setting, fair use tends to be more of a concern to academic or research libraries, where copying works for course reserves, course packs and research copies is the norm. However, public libraries are also concerned with fair use. First, under section 108 not all types of media are covered. Section 108(i) limits the rights of reproduction and distribution under the section by excluding from its privileges musical works, pictorial, graphic or sculptural works and certain motion picture and audiovisual works. In making copies for distribution of these types of works the public library would therefore need to rely on the fair use provisions of section 107. Also, if a library has need to go beyond the scope of section 108 (*e.g.* make four copies of a work instead of three), it can do so if such copying would fall within the provisions of section 107.

4. The "First Sale Doctrine"

The third limitation on the exclusive rights accorded to copyright owners of importance to public libraries is found in section 109 of the Copyright Act. Known as the "first sale doctrine," section 109 provides that a copyright owner's rights under section 106(3) to distribute copies of their work by sale or transfer ceases once the copyright owner has parted ownership with a particular copy, i.e. once a copyright owner sells a copy of the work, the new owner can sell or otherwise dispose of that copy as she sees fit. This doctrine is what permits libraries to lend books once it has legally purchased those books from the copyright owner. The doctrine does not, however, abrogate any rights an owner has to the intellectual property embodied in the work, only the owner's ability to control sales and distributions of a particular copy of the work that has been legally transferred.[10]

The Public Library As Intermediary In Digital Space

The traditional role of the public library as intermediary is being altered by recent changes in contract practice between publishers and libraries, alterations to copyright law, and new applications of technology to digital content.

Publishers have resisted applying the same real space rights to digital works. In the digital realm, traditional library functions are being re-ordered by the use of contract licensing for content. Instead of allowing libraries to purchase content and to distribute that content to patrons via the "first sale doctrine," licensing contracts strip libraries from actually owning content. A license merely grants certain rights to content, pursuant to certain terms, whereas an actual sale, subject to the first sale doctrine, limits the rights a copyright holder has to the work. Licensing results in a reliance on contractual obligations rather than copyright laws for determining how libraries may lend, copy, archive, and preserve content.

One reason for the push to license is that publishers and other providers of digital information have perceived digital distribution as a threat to their businesses and their bottom lines. The application of the licensing model, however, is currently creating a negative impact on the functionality of the public library. Under section 108(f)(4) of the Copyright Act, a library is obligated to adhere to any contractual terms it accepted at the time it acquired a copy of the work. Thus, if a library contracts with a publisher for access rights to certain digital materials, and that contract prohibits archiving rights, perpetual access, or copying, a library will not be able to fulfill many of its most basic functions.[11]

Conclusion

Creating a role for libraries as intermediaries of digital content requires a legal and technological framework that takes into consideration current licensing frameworks, rights management systems and the intricacies of current copyright law. The solution lies in a concerted effort to bring each area into harmony with the others. What is needed is

(1) A licensing framework that can enable libraries to provide their patrons full and traditional access to works in digital form;

(2) A reformation of copyright law,

(3) A rights management scheme that can adequately balance both access and security of digital content.

By turning an immediate focus to the current terms of licensing contracts, libraries and publishers can begin moving the ball toward meeting these needs. Art of law reform is creating consistent practices and developing guidelines and standards which can serve as the basis for later codification. Libraries need to begin to make licensing work for them. Using standards and model licensing agreements gives libraries the tools to begin this process.

Endnotes

1. Michelle M. Wu, "Why Print and Electronic Resources Are Essential to the Academic Law Library" Law Library Journal 97 (2005): 233-259.
2. *ibid* i.
3. http://www.legislation.gov.uk/ukpga/1988/48/contents, visited on 18/01/2012.
4. http://laws-lois.justice.gc.ca/eng/acts/C-42/,visited on 18/01/2012.
5. http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/, visited on 18/01/2012.
6. http://education.nic.in/copyright.asp,visited on 18/01/2012.
7. http://education.nic.in/CprAct.pdf, visited on 18/01/2012.
8. http://www.copyright.gov/title17/, visited on 18/01/2012.
9. http://www.copyright.gov/legislation/hr2281.pdf, visited on 18/01/2012.
10. Kristen M. Cichocki,"Unlocking The Future of Public Libraries: Digital Licensing That Preserves Access", University of Baltimore Intellectual Property Law Journal, 16 (2007): 29-59.
11. *ibid* X.