

# THE LIBRARIES EXCEPTION: WHAT THE AMENDED COPYRIGHT ACT DOES (AND SHOULD DO) FOR PRESERVING AND SHARING KNOWLEDGE IN THE DIGITAL ERA

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*Libraries, especially those which are universally accessible and funded by the state, have been seen as important means to democratize access to knowledge, and have gained renewed relevance in the information age as agents through which the digital divide can be addressed, particularly in developing countries. India's system of statutorily established libraries has seen considerable State attention since independence through policy-making, legislation and financial investment through the successive Five Year Plans aimed at ameliorating infrastructure. Nevertheless, much still remains to be achieved. Creating the legal infrastructure as well as the technological edifice for an effective, sustainable and relevant system of public and national libraries, is crucial for ensuring that these institutions are capable of preserving and sharing content (whether it is books, art or audio and/or visual content) effectively. This paper examines the amended Indian Copyright Act, 1957 for its compatibility with the project of modernizing our libraries, and attempts to suggest how the vacuum should be filled in.*

## I. INTRODUCTION

Much in the Copyright (Amendment) Act, 2012 ('Amendment') has raised debate and contestation. In the case of libraries however, the small number of references to them in the amended copyright law creates, instead, a welcome opportunity to cement, in discursive terms, the beginning of work toward a project of proactively building the legal infrastructure for preserving and facilitating access to informational and cultural commodities. Presently, there is little in the legal framework governing them that will allow Indian libraries to flourish. While laws across a spectrum of fields would bear on the public library's operation, copyright policies have, for obvious reasons, an especially intimate relationship with the strength to which it will grow.

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This paper generally analyses the successes and missed opportunities of the Amendment in creating a regulatory environment conducive to content preservation, lending and sharing through institutional intermediaries, whether public or private. It begins by tagging the elements in the prototypical scheme for balance in copyright policy and discussing the notion of public goods. Further, it proceeds to outline the functions and benefits of libraries to information markets and cultural commons, especially where they are public institutions. Against the backdrop of international standards of copyright and in light of the changes made in the Amendment (such as enabling format-shifting and in relation to public libraries specifically in §§51(b) and 52(1)(n)), this paper analyses the prospects for the creation of an Indian digital public library and attempts to tease out the issues attendant in a potential digitization project. Through the lens of the fundamental objects that copyright is intended to serve (particularly as articulated by the Access to Knowledge or 'A2K' movement), applicable international instruments and comparative analysis, this paper is intended to serve as an assessment of the effectiveness of the Amendment's changes and an inventory of the progress yet to be achieved.

## II. KNOWLEDGE, COPYRIGHT & THE PUBLIC INTEREST

The project of creating and maintaining a valuable and useful public domain is one that has historically been recognized as that requiring state intervention. Similarly, the premise that copyright law is intended to soften the tussle between incentive and access has reached axiomatic status. The Statute of Anne's preambulatory statement that the legislation was intended "for the encouragement of learned men to compose and write useful books"<sup>1</sup> and the United States' Constitution's intent that copyright legislation be purposed to the "promot[ion of] the progress of science and useful art",<sup>2</sup> are common evidences of the historicity and axiomatic status of these propositions. There is also the more broadly framed question of an access-restrictive copyright law's compatibility with the constitutional protections for speech generally, and the right to receive information in particular.<sup>3</sup> Indeed, attention has also been paid to the question of whether the two are inherently incompatible or, rather, mutually supportive.<sup>4</sup> At any rate, it is possible to conceive the access objective as a subsidiary element of our constitutional mandate in Article 19(1)(a).

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<sup>1</sup> Statute of Anne, 1710, 8 Anne, c. 19 (1710) (United Kingdom).

<sup>2</sup> United States Constitution, Art. 1, Cl. 8.

<sup>3</sup> Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal, AIR 1995 SC 1236.

<sup>4</sup> Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press*, 17 UCLA L. REV. 1180 (1969-70) (Nimmer's analysis is, however, undertaken in the context of the United States Constitution which differs notably from the Indian Constitution in its inclusion of a reference to copyright in its text).

A clear, explicit and international human right of access to information and culture was articulated as early as in 1948, with the passage of the Universal Declaration of Human Rights. Article 27 of the Declaration provides that there is a right to share in scientific advancements and the community's cultural life. Even though the same provision contains the requirement to protect authors' rights in their work, it is clear that the two are intended to run concurrently. Parenthetically, it may be of interest that Habermas argued that copyright and the public domain emerged *together*, over the socially transformative process of the emerging "public sphere".<sup>5</sup> Copyright policy will be effective if it is able to achieve the elusive balance between the two and much effort has been expended in attempting to precisely identify the balancing point of copyright's objects.<sup>6</sup> Much scholarly attention has, however, also been directed to copyright legislation's failure to achieve this across jurisdictions.<sup>7</sup> Copyright legislation, generally, has been seen as being biased in favour of monopolisation of content rather than the cultivation of public domain.<sup>8</sup> There is, however, evidence for the proposition that, notwithstanding the incentive to create that copyright affords authors, works would be created even without copyright protection.<sup>9</sup> Therefore, while recognition of the need for incentives is necessary, exclusive emphasis on them may not make for optimal policy. The Geneva Declaration on the Future of the World Intellectual Property Organisation, 2004 for instance refers to "global crisis in the governance of knowledge, technology and culture" and particularly references the misappropriation of public goods and the 'morally repugnant' inequities of knowledge, *inter alia*, which undermine societal development and cohesion.<sup>10</sup> This type of approach is consistent with the view that the task of constructing affirmative rights in the public domain, over negative concessions culled out of copyright, is a legal as well as rhetorical project.<sup>11</sup>

The A2K movement consists in an attempt to repurpose the legal architecture governing content so that an equitable and enriched public domain can be cultivated.<sup>12</sup> One area of law that the A2K movement seeks to reform is

<sup>5</sup> JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 57-67 (1991).

<sup>6</sup> See, e.g., Arnold Plant, *The Economic Aspects of Copyright in Books*, 2 *ECONOMICA* 167 (1934); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 *HARV. L. REV.* 281 (1970); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 *JOUR. LEG. STUD.* 325 (1989).

<sup>7</sup> See, e.g., Lea Shaver, *The Right to Science and Culture*, 10 *WIS. L. REV.* 121 (2010).

<sup>8</sup> See, e.g., Ian E. Novos & Michael Waldman, *The Effects of Increased Copyright Protection: An Analytical Approach*, 92 *J. POL. ECON.* 236 (1984); Michael O'Hare, *Copyright: When Is Monopoly Efficient?*, 4 *J. POLICY ANALYSIS & MGMT.* 407 (1985).

<sup>9</sup> Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 *AM. ECON. REV.* 421 (1966); Eldred v. Ashcroft, 537 U.S. 186 (2003) (Breyer, J.'s Dissent).

<sup>10</sup> Geneva Declaration on the Future of WIPO, available at <http://www.cpotech.org/ip/wipo/genvedeclaration.html> (Last visited on January 30, 2012).

<sup>11</sup> Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 *LAW AND CONTEMPORARY PROBLEMS* 75 (2003).

<sup>12</sup> Lea Shaver, *Defining and Measuring A2K: A Blueprint for an Index of Access to Knowledge*, 4 *I/S: J.L. & POL'Y FOR INFO. SOC'Y* 235 (2008) (Shaver's discussion of the conceptual framework for A2K provides a good introduction).

copyright law. In particular, it has been argued that developing countries are net importers of knowledge and that since the knowledge and innovation environment is regulated primarily by intellectual property rights including copyright, their reform is crucial to the achievement of any correction in the cycle of production and development of informational commodities in those economies.<sup>13</sup> Libraries and archives are specifically recognized as actors in the A2K movement, along with digital rights groups, consumer interest groups, international organizations (such as the World Intellectual Property Organization and the World Trade Organization), governments and academia.<sup>14</sup>

In addition to the Geneva Declaration referred to above, a number of other instruments address the movement and its aims. Notable among them are the draft A2K Treaty,<sup>15</sup> the Munich Declaration on copyright limitations and exceptions,<sup>16</sup> the Copyright for Creativity Declaration,<sup>17</sup> the Adelphi Charter on Creativity, Innovation and Intellectual Property,<sup>18</sup> the Free Culture Forum's Charter for Innovation, Creativity and Access to Knowledge<sup>19</sup> and the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities.<sup>20</sup>

Two core economic characteristics of information introduce a strong, pragmatic impetus to the moral, constitutional and human rights-based cases for maximizing and democratizing access to information and cultural commodities. *First*, information is non-rivalrous in nature, i.e., consumption of information by any given consumer does not diminish the quality or quantity of it available to others. *Second*, information is of a non-excludable character in that no single consumer can be prevented from availing of it once it is introduced into the market. As a result, knowledge would amount, in economic terms, to a public good, which tends to be under-supplied in unregulated markets. There has been significant discussion of knowledge as a public good as

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<sup>13</sup> MOHAMMED EL SAID, *BIBLIOTECA ALEXANDRIA* 53 (2009).

<sup>14</sup> *ACCESS TO KNOWLEDGE: A GUIDE FOR EVERYONE* 28 (Frederick Noronha & Jeremy Malcolm eds., 2010).

<sup>15</sup> Draft Treaty on Access to Knowledge, 2005, available at [www.cptech.org/a2k/a2k\\_treaty\\_may9.pdf](http://www.cptech.org/a2k/a2k_treaty_may9.pdf) (Last visited on October 15, 2012).

<sup>16</sup> Munich Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law, 2008, available at [www.ip.mpg.de/shared/data/pdf/declaration\\_three\\_steps.pdf](http://www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf) (Last visited on October 15, 2012).

<sup>17</sup> Copyright for Creativity – A Declaration for Europe, available at <http://www.copyright4creativity.eu/Public/Declaration> (Last visited on February 7, 2013).

<sup>18</sup> Adelphi Charter on Creativity, Innovation and Intellectual Property, available at <http://www.thersa.org/action-research-centre/past-projects/adelphi-charter> (Last visited on October 15, 2012).

<sup>19</sup> Free Culture Forum's Charter for Innovation, Creativity and Access to Knowledge, 2009, available at [http://fcforum.net/charter\\_extended](http://fcforum.net/charter_extended) (Last visited on October 15, 2012).

<sup>20</sup> Berlin Declaration on Open Access to Scientific Knowledge in the Sciences and Humanities, available at <http://oa.mpg.de/lang/en-uk/berlin-prozess/berliner-erklarung/> (Last visited on October 16, 2012).

well as a global public good,<sup>21</sup> and the simple consequence of such a finding in basic economic theory is that such commodities are necessarily under-supplied in a free market and will require some form of government intervention to ensure equitable access to them. State provision would not only create access to an undersupplied and socially relevant commodity, but it would also allow for the reduction (if not removal) of search costs for consumers in markets for other commodities where information is freely and easily accessible. Regulating non-excludable public goods such as intellectual property commodities, in general, is however a complex process. Public choice theory posits that where diffuse or politically impotent groups are the affected parties in the regulatory measure, their interests are likely to be overridden by more concerted, organized competing interests.<sup>22</sup>

### III. THE PUBLIC LIBRARY IN INDIA

#### A. THE TROPE OF THE PUBLIC LIBRARY

Creating a system within which libraries can function effectively is a key element in achieving the meaningful balance of objects in copyright law discussed above.<sup>23</sup> Opening up access to a knowledge and cultural commons for *all* is a function that the state machinery has attempted to take through a system of libraries, on the understanding of their nature as a public good whose provision would necessarily improve overall social welfare. This utilitarian draw extends similarly to two other functions that public libraries perform. These are the functions of curating and then sustainably preserving information and culture. Notably, none of the general literature (and this concern extends to the law as well) seems to find it necessary to define the term ‘library’. The UNESCO Public Library Manifesto of 1994 uses the terminology of the ‘missions’ of the public library, identifying four broad areas which should constitute, what it terms, the ‘core’ of the library’s work: information, literacy, education and culture.<sup>24</sup> Subsequent arguments in this paper examine how copyright law could create conditions to allow the effective performance of both sets of functions.

Public libraries, then, are intended as important intermediaries in the delivery of, and democratized access to information and culture. Over time, and across societies, public libraries have emerged as focal points in the

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<sup>21</sup> Joseph Stiglitz, *Knowledge as a Global Public Good* in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21<sup>ST</sup> CENTURY 308 (1999).

<sup>22</sup> WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 403-408 (2003).

<sup>23</sup> See *supra* Part II.

<sup>24</sup> Marian McFadden, *Objectives and Functions of Public Libraries*, 1(4) LIBRARY TRENDS 429 (1953).

narratives of the empowerment of communities,<sup>25</sup> and as instruments to facilitate equal social opportunities for all members of a given community. They have been recognized to facilitate social mobility, to serve as repositories of the collective memories of states, societies and communities and as points of deposit and exchange of ‘cultural capital’.<sup>26</sup> Even as historical arguments for the public domain hinged largely on the negative case of the criticisms of literary property,<sup>27</sup> discourse around the information age, undergirded as it is by democratic values and the possibilities unlocked by digital technologies, forces emphasis of the positive case. Admittedly, the traditional paper-based library is becoming an insufficient instrument in the context of the A2K project in the digital era. That may have been the reason for calls for the traditional public library to re-invent,<sup>28</sup> but the consensus as to their utility and, indeed, their significance remains intact. Arguments in favour of the need for public libraries have only sharpened in the digital or ‘information age’. One argument refers, in the context of the digital divide, to the impact of information inaccessibilities and asymmetries as having adverse consequences for democracy. The need for libraries in this context is asserted in the following terms: “Libraries are a bridge between the information-rich and the information-poor. They need reinforcing, not dismantling”.<sup>29</sup>

## B. THE PUBLIC LIBRARY AND THE INDIAN STATE

Public libraries have been an important part of the Indian information landscape, as it were. One source even argues that the importance of libraries was explicitly recognized during the nationalist movement, with sessions of the All India Public Library Association (‘AIPL’) being held concurrently with

<sup>25</sup> See, e.g., Gary E. Strong, *Libraries Empower People to Participate in a Civil Society* in EMERGING VISIONS FOR ACCESS IN THE TWENTY-FIRST CENTURY LIBRARY 27 (2003); Library of Congress, *Dr. Billington Tells Congress the Importance of Local Public Libraries to America’s Electronic Future*, April 6, 1993 available at <http://www.loc.gov/today/pr/1993/93-057.html> (Last visited on December 20, 2012); Svanhild Aabø, *The Role and Value of Public Libraries in the Age of Digital Technologies*, 37(4) JOURNAL OF LIBRARIANSHIP AND INFORMATION SCIENCE 205 (2005); International Federation of Library Associations and Institutions, *The Role of Public Libraries in Lifelong Learning* (Adopted by the IFLA Section for Public Libraries, Mid Term Meeting in Ljusdal Sweden, March, 2004), available at <http://www.ifla.org/node/1025> (Last visited on October 10, 2012).

<sup>26</sup> Elizabeth Dias, *Why Libraries are a Smart Investment in the Country’s Future*, June 27, 2012, available at <http://www.time.com/time/nation/article/0,8599,2118141,00.html> (Last visited on November 1, 2012).

<sup>27</sup> James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMPORARY PROBLEMS 33, 120-125 (2003).

<sup>28</sup> See, e.g., Allison Berry, *How Libraries are Reinventing Themselves for the Future*, June 22, 2012, available at <http://newsfeed.time.com/2012/06/22/how-libraries-are-reinventing-themselves-for-the-future/> (Last visited on November 1, 2012).

<sup>29</sup> Ian Clarke, *We Still Need Libraries in the Digital Age*, July 13, 2010, <http://www.guardian.co.uk/commentisfree/2010/jul/13/internet-age-still-need-libraries> (Last visited on November 1, 2012).

those of the Indian National Congress.<sup>30</sup> Echoing the broad generalities as regards the importance of libraries, it is empirically evident in India as well, that libraries have served as ubiquitous social institutions.<sup>31</sup> The setting up of the Delhi Public Library with UNESCO's assistance in the early 1950's was opined to be a laudable step, serving a primary need.<sup>32</sup> The Centre has invested in our public libraries across Five Year Plans.<sup>33</sup> In addition, there has also been legislation establishing public libraries across states. The Central Government's Department of Culture appears to have had a section dedicated to libraries from 1979 onward. Policies addressing books and libraries have also been adopted by the Central Government from time to time. A small amount of legislation is also relevant. In addition to the provision for the library exception in the Indian Copyright Act, 1957 ('Copyright Act') there is Central legislation requiring publishers to ensure delivery of their works to designated libraries, and state legislation establishing a public library in the state.

Deposit libraries in the country, which perform the preservation function of the public library by holding copies of all Indian publications, have been statutorily provided. The Delivery of Books Act 1954 (amended once in 1956) establishes four such designated legal depositories across the country, and the Central Government has stated its intention to extend the requirement of deposit to works in digital formats as well. An Advisory Committee for Libraries was appointed in 1957 by the Government of India, with K.P. Sinha as its Chairman. The Committee drafted a Model Library Bill and drew up a 25 year plan to guide library development in newly-independent India. S.R. Ranganathan's Model Public Library Bill served as a key starting point in the evolution of Independent India's legislative activity concerning libraries.<sup>34</sup> The question of modernizing libraries has also been attempted to be addressed by the Indian state. At least two bodies, the Working Group on Modernization of Library Services and Informatics and the Committee on National Policy on Library and Information Systems were appointed in 1983 and 1985 respectively to examine the question.

<sup>30</sup> Dwarika N. Bannerjee, *The Story of Libraries in India*, 125(4) DAEDALUS: BOOKS, BRICKS, AND BYTES 353 (1996).

<sup>31</sup> K. Ramakrishna Rao, *Library Development in India*, 31(2) THE LIBRARY QUARTERLY 135, 143 (1961).

<sup>32</sup> Frank M. Gardner, *Founding a Public Library in India*, 49(9) ALA BULLETIN 495, 498 (1955) (Gardner provides a narrative of the state of Indian libraries prior to the setting up, with UNESCO's assistance, of the Public Library in Delhi and the appetite at the time for such a service).

<sup>33</sup> Zahid Ashraf Wani, *Development of Public Libraries in India*, 10(1) LIBRARY PHILOSOPHY AND PRACTICE 1 (2008).

<sup>34</sup> Model Public Library Bill 1964, available at <http://library.isical.ac.in/jspui/bitstream/10263/1125/1/LSWASTD-1-4-1964-P384-414.pdf> (Last visited on February 8, 2013).

## IV. THE COUNTOURS OF THE LIBRARIES EXCEPTION TODAY

### A. *THE LIBRARIES EXCEPTION IN EXISTING INTERNATIONAL INSTRUMENTS*

A number of crucial references to exceptions for libraries and archives in international instruments occur, in addition to broad affirmations on the need for balancing the owners' and public interests.<sup>35</sup> This part provides for a selective history and inventory of the elements contained in the libraries exception.<sup>36</sup>

The Berne Convention for the Protection of Literary and Artistic Works, 1886 ('Berne Convention') is an important starting point for its inclusion of provisions related to exceptions and the three step test. While it did not specifically mention libraries or archives among the permitted exemptions, it did lay down a generic rule in the three step test under Article 9(2). The provision allowed Member States to enact any statutory exception which was in conformity with the three step test. This essentially provided a framework to legislators for the formulation of various copyright exceptions.

The Berne Convention had considerable impact on the formulation of future treaties. In 1994, the Agreement on Trade Related Aspects of Intellectual Property Rights ('TRIPS') was enacted at the Uruguay Round of negotiations concerning the General Agreement on Tarrifs and Trade. TRIPS adopted many provisions from the Berne Convention including the ones related to the 'three step test', which were included in its Article 13. Though the language was almost identical to that of the Berne Convention, there were some notable differences. The paramount among these was that TRIPS declared the test in mandatory terms and required the Member States to confine their statutory provisions within the framework of the agreement. TRIPS was followed by the enactment of the WIPO Copyright Treaty which provided some important exceptions and limitations in the digital environment. The main exceptions were dealt in Article 10(1) of the treaty, whose terms were parallel to the three step test. There was, however, one significant alteration: the introduction of anti-circumvention measures. No new exceptions specifically dealing with libraries and archives were introduced.

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<sup>35</sup> See, e.g., Preamble to the WIPO Copyright Treaty, 1996.

<sup>36</sup> There are other important areas of library services that copyright must address. These would include ensuring the availability of content in accessible formats and, to a lesser extent, facilitating inter-library lending. To the extent that these are priorities not *wholly* dependent on the digitization project, they are referenced only cursorily here.



Where they do occur specifically, the exceptions for libraries and archives primarily address such issues as the reproduction of copyrighted works for limited purposes (such as private research, preservation or replacement of materials damaged materials). Of the World Intellectual Property Organization's ('WIPO') 184 members, 128 have at least one statutory exception dealing exclusively with libraries. One of the first instances of their incorporation was the British Parliament's enactment of a specific provision dealing with libraries in 1956.

The Tunis Model Copyright Law of 1976,<sup>37</sup> promoted by both WIPO and UNESCO, also bears mention. The intention of the drafters of this instrument was to carve out a general library exception which was compatible with the language of the three step test. It provides for a specific library exception which shaped the corresponding sections in legislations across various jurisdictions. The exception itself is a simple one, providing for protection to public non-profit libraries for their reproduction of artistic and literary works, provided that such reproduction did not conflict with the normal exploitation of the work. Notable regional consensus on the need for a library exception is evident in the EC's Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society of 2001 ('Information Society Directive'). The Directive mandated substantial changes to copyright legislation across the EU region. One significant change was the requirement in Article 5(2)(c) for allowing exceptions to reproduction rights to publicly accessible libraries and archives. Another related to the right to communicate to public. Article 3 established for authors the "right of communication to the public" of their works and authorized under Article 5(3)(n), the creation of exceptions permitting libraries to 'make available' copyrighted works at dedicated terminals.

Other instruments have also recognized the need for library-conducive copyright regimes and have attempted to incorporate library specific exemptions in their instruments. Among them is the Bangui Agreement<sup>38</sup> which covers sixteen French-speaking countries in central Africa and provides for a library exception directly adopted by Member States where the agreement is enforceable. Another proposal is for an A2K Treaty put forward by Argentina and Brazil and endorsed by important institutions such as the International Federation of Library Associations ('IFLA'). This treaty arose out of a move-

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<sup>37</sup> Tunis Model Law on Copyright Law, 1976, available at [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=31318&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=31318&URL_DO=DO_TOPIC&URL_SECTION=201.html) (Last visited on February 10, 2012).

<sup>38</sup> The Bangui Agreement Relating to the Creation of an African Intellectual Property Organization, Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property, 1977 (Official Translation) and the Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization (Official translation), available at [http://www.wipo.int/wipolex/en/other\\_treaties/details.jsp?treaty\\_id=227](http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=227) (Last visited on October 15, 2012).

ment which advocated provisioning for a ‘right to knowledge’ and called upon WIPO to alter its exceptions and limitations mechanisms. The specific exemptions granted to libraries under this treaty include circumstances where copyright holders may not prevent fair use of content including cases where the use is for purposes of library or archival preservation.<sup>39</sup>

## *B. THE LIBRARIES EXCEPTION IN NATIONAL LEGISLATION*

This part outlines the approach of the United States (where a good deal of work towards the ‘new’ libraries discussed below<sup>40</sup> is taking shape) and the United Kingdom (with whose copyright law our own shares historical grounds for comparison) to the libraries exception.

### 1. The United States

§108 of Title 17 of the United States Code concerning Copyrights provides for a copyright limitation in favour of libraries and archives. These exceptions are applicable to any library which engages in any reproduction without the intention of deriving any advantage, direct or indirect, from the activity,<sup>41</sup> and whose collections are open to the public at large.

There are two bases upon which these exceptions can be invoked. The first is where the purpose is the replenishment of a library’s collection. Under this category, libraries may duplicate unpublished works including sound recordings and motion pictures (the term used being ‘phonorecords’<sup>42</sup>) solely for the purposes of preservation and security, so that these works may not be lost to the public. In addition, published works may be reproduced in order to replace copies which have deteriorated or which have been damaged, lost or stolen.<sup>43</sup> In order to ensure that copies of works provided by libraries are easily accessible and useful to the public, however, the exemption also applies if the existing form in which the works is stored has become obsolete.<sup>44</sup>

The second basis for which these exceptions can be invoked relates to reproduction and distribution of works to library users. The condition precedent to the applicability of these is for the library to have no notice that the copy would be used for any purpose other than private study, scholarship, or

<sup>39</sup> See A2K Treaty, Art. 3.1, available at [http://www.cptech.org/a2k/a2k\\_treaty\\_may9.pdf](http://www.cptech.org/a2k/a2k_treaty_may9.pdf) (Last visited on October 15, 2012).

<sup>40</sup> See *supra*, Part VII.

<sup>41</sup> Title 17, United States Code, §108(a)(1).

<sup>42</sup> Title 17, United States Code, § 101 (defining the term).

<sup>43</sup> Title 17, United States Code, §108(c).

<sup>44</sup> *Id.*

research.<sup>45</sup> Pursuant to the satisfaction of this condition, the library in question is permitted to reproduce and distribute one copy of that work. A library cannot, however, claim the benefit of this exemption if it is aware or has substantial reason to believe that its repeated reproduction of single copies of the same material is intended for aggregate use by one or more individuals.

## 2. The United Kingdom

Specific exceptions for libraries and archives were enacted for the first time by the British Parliament when it revised the British Copyright Law in 1956.<sup>46</sup> By promulgating the first exception of such kind for libraries and archives, the United Kingdom set a benchmark that other states would soon follow. The need for crafting a separate exception stemmed from the inability of fair dealing provisions to deal with situations where demands were made upon public libraries to supply copies of works in their collections.<sup>47</sup> The provisions of these specific exceptions apply to libraries and archives of descriptions prescribed by the regulations which are made by the Secretary of State.<sup>48</sup> Under these provisions, the librarian may reproduce works for preservation, lending or copying of articles or periodicals by users.

Two categories of exception are addressed: the first dealing with supplying of copies to users or other libraries and the second dealing with restoration and preservation of works. The copyright law of the United Kingdom provides exclusive rights to the librarians to make and supply a copy of an article in a periodical<sup>49</sup> and a copy of a part of any literary, dramatic or musical work without infringing copyright in the work.<sup>50</sup> This right is restricted by application of certain conditions. Librarians may supply only a single copy to users who fulfil the requirement that the copies are intended for use in research or private study and for no other purpose. In addition, the exception also allows librarians of a prescribed library to make and supply copies of a work for other prescribed libraries under certain conditions. It is, however, pertinent to note here that such an exception would not apply if the librarian making the copy could by reasonable inquiry ascertain the name and address of a person entitled to authorise the making of a copy.<sup>51</sup> The second category of exceptions deal exclusively with restoration and preservation of works which may become damaged or destroyed. In these circumstances, librarians are permitted

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<sup>45</sup> Title 17, United States Code, §108(d)(1)(e)(1).

<sup>46</sup> Kenneth Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives*, November 3, 2008, available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_17/sccr\\_17\\_2.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf) (Last Visited on October 14, 2012).

<sup>47</sup> COPINGER AND SKONE JAMES ON COPYRIGHT 522 (Kevin Garnett, Gillian Davies, Gwilym Harbottle, eds., 2008).

<sup>48</sup> *Id.*

<sup>49</sup> Copyright, Designs and Patents Act, 1988, §38(1) (U.K.).

<sup>50</sup> Copyright, Designs and Patents Act, 1988, §39(1) (U.K.).

<sup>51</sup> Copyright, Designs and Patents Act, 1988, §41(2) (U.K.).

to make copies of any work present in their permanent collection. This exception applies only to published or unpublished reference items and not to articles available for public lending.<sup>52</sup>

## V. SCOPE OF COVERAGE OF LIBRARIES IN THE INDIAN COPYRIGHT ACT, 1957

Admittedly, the Copyright Act does not explicitly intend to serve as a comprehensive instrument to address the copyright issues attendant in the provision of physical or digital library services. As a result, there are no separate provisions dealing with libraries and archives under the Act, although the fair dealing provisions specifically cover libraries and archives to a limited extent. Under §52(1)(o), a non-commercial public library is allowed to make not more than three copies of a book for library use, provided such books are not available for sale in India.<sup>53</sup> The term ‘library’ is undefined in the Copyright Act. There is, similarly, no indication of how the various qualifiers attached to the term across the legislation should be interpreted. Further, the phrase “not available for sale in India” has not been defined or tested so that we may have some guidance on whether for instance, the purchase of a book from an e-commerce website operating out of the United Kingdom, but delivered to India would be understood as the purchase of a book that is “available for sale in India”.

Other than this, §52(1)(p) permits reproduction of literary, dramatic or musical work for the purpose of research or private study, provided that these works are kept in the library or 60 years have passed since the death of the author.<sup>54</sup> The Amendment has brought about another provision which now allows a non-commercial public library to store a work in any medium by electronic means for the sole purpose of preservation, provided that the library possesses a non-digital copy of the work.

The Amendment makes five small but significant contributions to the law governing public libraries in India. *First*, in a welcome step in favour of libraries’ preservation function *vis à vis* culture, there is §14(c)(i)(A) which now provides that the reproduction right includes “the storing of works in any medium by electronic means”. Given however that § 14(c) is limited to cinematograph works alone, the progress is quite limited.

*Second*, there is the introduction of §2(1)(fa), which defines the term ‘commercial rental’. Importantly, the term which applies to content other than books and artistic works is now defined negatively, to exclude lending for

<sup>52</sup> COPINGER AND SKONE JAMES ON COPYRIGHT, *supra* note 47.

<sup>53</sup> Indian Copyright Act, 1957, §51(1)(o).

<sup>54</sup> Indian Copyright Act, 1957, §51(1)(p).

non-profit purposes by a 'non-profit library' or a 'non-profit educational institution'. The Explanation to the section provides that libraries and educational institutions will have non-profit status where they receive grants from the state or are exempted from paying tax in terms of the Income Tax Act, 1961.

*Third*, the new §52(1)(n) is also notable. It provides that the storage of a work by electronic means by a 'non-commercial public library' for the purposes of preservation is permissible where the library in question already possesses a physical or analogue copy. While the recognition of the need to legislatively facilitate the preservation function is notable, there is neither clarity in the limitation to differing subsets of public libraries, nor a clearly discernible justification for it.

*Fourth*, the Amendment replaces the term 'hire' appearing throughout the Copyright Act with the arguably narrower term 'commercial rental'. There is, however, a single notable exception in §51, in which the term hire continues to appear. It does not appear that either term is in popular use in copyright statutes elsewhere. However, some guidance could be drawn from the plain, dictionary meanings of the terms. 'To hire' means "to procure the temporary use of property, usually at a set price" or "to grant the temporary use of services".<sup>55</sup> Rental rights, on the other hand, refer to "the power of a copyright owner to control the use of copies of the work beyond the first sale, when that use involves offering the copy to the public for temporary use for a fee (as at a store renting DVDs and videotapes) or some other commercial advantage".<sup>56</sup> As a result, it is arguable that the term 'hire' is broader than 'commercial rental' on the grounds that a limitation to 'commercial' purposes alone applies to the latter terminology.

These amendments may be justified on two grounds. *First*, and more conveniently, the failure to swap terms in §51 may have been simple oversight. On the other hand, it is possible to view the omission to substitute as a deliberate legislative measure. This view could allow for some insight into the reasons for the swap elsewhere in the Copyright Act. Two reasons could justify the substitutions and the omission to do so in the case of §51. The change brings the Copyright Act into conformity with the provisions as to copyright flexibilities in important international instruments including the TRIPS agreement and the WIPO Copyright Treaty. The failure to swap the term 'hire' for 'commercial rental' could then signal the intent to retain the full breadth of efficacy of the provisions relating to infringement under §51.

*Finally*, there is the use of varying qualifiers in reference to libraries across the Copyright Act. Simple reference to 'libraries', without apparent qualification occurs in the context of fair use in §§52(1)(p) and (zb). In similar

<sup>55</sup> BRYAN A. GARNER, BLACK'S LAW DICTIONARY 748 (2004).

<sup>56</sup> *Id.*, 1324.

contexts, §52(1), at Cls. (n) and (o) refer to ‘non-commercial public libraries’. §2(1)(fa) refers to ‘non-profit libraries’, the only such term to be defined in the Act. Elsewhere, the only other central legislation that appears to touch upon this question is the Delivery of Books and Newspapers (Public Libraries) Act, 1954. It uses the terminology of ‘public library’ only to designate four libraries for legal deposit of all books, newspapers and serials.<sup>57</sup>

It is unclear whether the differing terminologies in the Act are intended to refer to different institutions. At any rate, these introduce a worrying lack of clarity for institutions seeking to avail the protections offered to libraries. A broader concern across all the provisions which relate to libraries is that of unnecessary limitations that these qualifiers introduce at all. All libraries should be entitled to take advantage of the exceptions created in their behalf, and it is a missed opportunity of the amendment to empower them to do so effectively.

## VI. AREAS FOR CROSS-POLLINATION?

The treatment of copyright flexibilities in the Berne Convention or, later in the TRIPS Agreement, is quite broad. Little in the manner of specific formulae is available.

The United States Copyright Act allows all libraries to avail of exemptions irrespective of whether they are commercial or non-commercial while our law refers more restrictively to ‘non-commercial public libraries’. Given the breadth of descriptors attached to the term ‘library’ across our law, it is unclear to what degree the protection is limited in practice. Unlike India, both the United States and United Kingdom copyright laws describe clearly the conditions under which libraries are allowed to reproduce a copy of a work, notwithstanding some divergence in their scope.<sup>58</sup> More importantly, while the law in the United States allows libraries to provide copies to individuals provided that there is no indication that it will be used for purpose other than private study, scholarship or research, the law in the United Kingdom stipulates a more proactive role for the librarian by providing that copies can only be made after due satisfaction of the librarian that a work is required for non-commercial purpose or private study. Another point of comparison relates to the *number* of copies which are permitted to be made. Taking into account the advent of the Internet and digitization of media, the Digital Millennium Copyright Act allows no more than three copies to be made for the purpose of preservation. A similar provision exists under §52(1)(o) of the Indian Copyright Act which

<sup>57</sup> Delivery of Books and Newspapers (Public Libraries) Act, 1954, §2(b): ‘public libraries’ means the National Library at Calcutta and any three other libraries which may be specified by the Central Government in this behalf by notification in the Official Gazette.

<sup>58</sup> While libraries in the USA do not permit copies of musical, pictorial, or graphic works to be made for the purpose of distribution to users, no such restriction exists in the United Kingdom.

allows a public library to make three copies of a qualified range of works, for its 'use'. Given the primary functions of a library, that term should extend to preservation and expanding access to the work in question.

Furthermore, the United States provides protection to libraries from unsupervised use of reproducing equipment located on its premises.<sup>59</sup> This is a progressive exception which exonerates libraries from acts for which it cannot be held responsible. The United States copyright law also allows for preservation of published works if the existing format in which the work is stored has become obsolete. This has been done to ensure that libraries continue to provide works which are easily accessible. No such provisions exist in the Indian law.

## VII. LOOKING AHEAD TO THE 'NEW' LIBRARIES: THE DIGITAL, UNIVERSAL AND VIRTUAL

It is now commonly accepted that India's libraries too will, as many other institutions have, be transformed by, or prepare to re-invent in the face of digital technologies. This section attempts to, in broad terms, categorize the changes that the traditional paper-based library and the copyright law governing it should undergo.

### A. DIGITAL LIBRARIES

The possibility that a universal, digital library will exist is no longer remote. The Digital Public Library of America ('DPLA') was launched at a limited scale, in April this year.<sup>60</sup> The EU is similarly working towards mass-digitization.<sup>61</sup> Digitization has been seen to be a key justification for emerging calls to comprehensively revise the manner in which copyright regimes work.<sup>62</sup> One particular area which has been subjected to much deliberation is the one concerning digitization of libraries. Provisions relating to traditional libraries are no longer applicable in the digital environment because works in the digital format present different expectations and capabilities.<sup>63</sup> In the digital

<sup>59</sup> Title 17, United States Code, §108(f)(1).

<sup>60</sup> Alison Flood, *Digital Public Library of America (DPLA) Opens to Public*, THE GUARDIAN May 2, 2013, available at <http://www.guardian.co.uk/books/2013/may/02/digital-public-library-america-dpla> (Last visited on June 20, 2013); Robert Darnton, *Jefferson's Taper: A National Digital Library*, November 24, 2011, available at <http://www.nybooks.com/articles/archives/2011/nov/24/jeffersons-taper-national-digital-library/?pagination=false> (Last visited on October 13, 2012) (Discussing some aspects of the DPLA).

<sup>61</sup> Digital Agenda for Europe: Digital Libraries Initiative, available at [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm) (Last visited November 15, 2012).

<sup>62</sup> See, e.g., Fiona Macmillan, *Libraries, Copyright and Digitisation*, 8 AUSTL. L. LIBR. 36 (2000).

<sup>63</sup> Laura N. Gasaway, *Amending The Copyright Act For Libraries And Society: The Section 108 Study Group*, 70 ALB. L. REV. 1331 (2006-07).

environment, works are made available in entirely different forms, capable of simultaneous consumption, easy accessibility particularly over the Internet and ease with distribution through peer to peer services.<sup>64</sup> Absent technological restraints to alter or suppress these characteristics, works in digital form could be seen by copyright owners to create new concerns for the law governing content sharing.

A digital library is essentially a digital retrieval system which stores collections in digital formats, which are accessible *via* computers and the Internet. In order to store works in digital formats, copies would have to be made and their formats altered. It is this copying, format-shifting and subsequent distribution which results in some of the more prominent copyright issues associated with digital libraries. One of the most important concerns in the intersection between copyright and the digitization of content is that of preservation. There is little debate to the proposition that digitization allows for a degree of permanence and security in storage of works without deterioration over time that was, until present, technologically impracticable. So then should the need of digital libraries to make copies for (digital) preservation purposes and or for future use be recognized by copyright law? Legislations generally grant these reproduction and dissemination rights to authors of works, thereby implying that such tasks can be legally performed only by a copyright holder.<sup>65</sup> This subsequently restricts the way in which a digital library would discharge its functions. Thus, while preserving orphaned works and unpublished materials is of paramount concern to digital libraries, the inherent conflict with the provisions of copyright law prevents them from engaging fruitfully in these endeavours.

Another issue arises out of the inherent features of digital works which copyright law across jurisdictions was not designed to deal with.<sup>66</sup> Unlike their printed counterparts, digital works can be easily and more importantly, simultaneously reproduced, distributed, and accessed. Such works would be open to all users of libraries, who may freely access and download them, thereby obviating the need for individual purchases of the text from the author or publisher of the work.<sup>67</sup> Therefore the principal concern for such libraries is to provide legal access to digital copies without infringing the author's

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<sup>64</sup> Mary Rasenberger, *Symposium: Digital Archives: Navigating the Legal Shoals Copyright Issues and Section 108 Reform*, 34 COLUM. J.L. & ARTS 33 (2010-11).

<sup>65</sup> Dionysia Kallinikou, Marinos Papadopoulos, *Intellectual Property Issues for Digital Libraries in the Internet Networked Public Sphere*, available at [http://europe.creativecommons.org/webfm\\_send/15](http://europe.creativecommons.org/webfm_send/15) (Last visited on October 12, 2012).

<sup>66</sup> Adrienne Muir, *Copyright and Licensing Issues for Digital Preservation and Possible Solutions*, available at <http://elpub.scix.net/data/works/att/0315.content.pdf> (Last visited on October 12, 2012).

<sup>67</sup> Pamela Samuelson, *Copyright and Digital Libraries*, available at <http://www.cparity.com/projects/AcmClassification/samples/205324.pdf> (Last visited on October 12, 2012).



rights.<sup>68</sup> Given that libraries are presently required to cap the number of copies they may make of a given work in their collection, this could raise liabilities for good faith distribution of works for libraries. Of course, the suggestion to incorporate equipment which do not allow the users to electronically reproduce or communicate in any manner the work in question (DRMs) could address the question.<sup>69</sup> But such measures would result in escalated costs to libraries in giving users access to digital material,<sup>70</sup> in addition to serving as artificial and arguably unfavourable restrictions on the natural accessibility to content that the new digital form allows.

Necessary to allowing effective accessibility to works in a library's repository is a first-sale doctrine for the digital age, by which legitimate purchasers, such as libraries, can assert rights of property purchased. A United States Federal Court already appears to be considering the question of whether first sale extends to electronic works.<sup>71</sup> The answer, emphatically, must be in the affirmative. Another practical concern relates to indexing digitally. In as much as even meta-data is sometimes proprietary, there is likely to be a separate and considerable expense on this account for libraries to bear.

The danger to digital libraries is that a complacent status quo would force them into the role of gatekeepers for the new information age, rather than making them its facilitators. That outcome is a troubling one, and one that should not come to pass.<sup>72</sup>

## B. 'VIRTUAL' LIBRARIES

Another new variant of library is the 'virtual' library. These are unlikely to have the brick and mortar existence of the traditional library, and will consequently have to be accessed by users differently as well. Libraries online will serve as important participants in the project to democratize access to information worldwide, without regard to the capacities of individual states to deliver the same to their citizens. In addition to the Google Books project,

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<sup>68</sup> Cynthia Gillespie, *Will Copyright Law Prevent a Digital Library from Becoming Reality?*, April 22, 2009, available at <http://eresearchlibrary.wordpress.com/2009/04/22/will-copyright-law-prevent-a-digital-library-from-becoming-reality/> (Last visited on October 12, 2012).

<sup>69</sup> Macmillan, *supra* note 62.

<sup>70</sup> *Id.*

<sup>71</sup> *Capitol v. ReDigi*, No. 12-0095, 2012 U.S. (S.D.N.Y.).

<sup>72</sup> Rainer Kuhlen, *Knowledge and Information – Private Property or Common Good? A Global Perspective* in *ETHICS AND LAW OF INTELLECTUAL PROPERTY: CURRENT PROBLEMS IN POLITICS, SCIENCE AND TECHNOLOGY* 227 (2007) ("It cannot be possible that information supply in electronic environments designed to ease access to knowledge and information becomes worse than it was in analogue environments").

Project Gutenberg,<sup>73</sup> Internet Archive<sup>74</sup> and its Open Library initiative<sup>75</sup> are all examples of this new type of library, operating as they do online.

Interesting attempts by these paperless, non-physical libraries to operate on the same physical processes as brick-and-mortar libraries are evident in their functioning as on date. For instance, there is the practice of continuing the fiction of a limit on the number of copies and treating them as rival commodities, such that a title once ‘borrowed’ by a user will need to be ‘returned’ before another can access a digital copy of the same title. Another instance raises an interesting question about what the law, as is, views as amounting to a ‘library’. Obviously, this requirement of being categorizable as a library is a condition precedent to being able to seek protection under the fair use provisions intended to cover them, as is the case under §§ 51 and 52 of the Copyright Act. It is in this context that the failure to define what a ‘library’ is under law and the continuing lack of clarity around the various terminologies used with regard to libraries in the Copyright Act becomes relevant.

### C. ‘UNIVERSAL’ LIBRARIES

The philosophical argument as to a strong moral imperative for the creation of a ‘universal library’ is by now a common one, and one used to ground the missions of emerging projects of mass-digitization.<sup>76</sup>

Recent experience with *Authors Guild v. Google Inc.*,<sup>77</sup> (‘Authors Guild’) shows that antitrust issues may emerge in addition to those in copyright in the context of establishing a universal digital library. The Amended Settlement Agreement (‘ASA’) between the parties in that case, and its subsequent rejection by the Court are both instructive. There is a key difference between the DPLA, for instance, and the Google ASA. Where the ASA failed on account, at least partly, of antitrust concerns,<sup>78</sup> the DPLA, being a public in-

<sup>73</sup> *About*, available at <http://www.gutenberg.org/wiki/Gutenberg>About> (Last visited on February 8, 2013).

<sup>74</sup> *About the Internet Archive*, available at <http://archive.org/about/> (Last visited on February 8, 2013).

<sup>75</sup> *Open Library: About Us*, July 27, 2010 available at <http://openlibrary.org/about> (Last visited on February 8, 2013).

<sup>76</sup> See Peter Singer, *Whither the Dream of the Universal Library?*, April 19, 2011, available at <http://www.guardian.co.uk/commentisfree/2011/apr/19/moral-imperative-create-universal-library> (Last visited on October 13, 2012); Nicholas Carr, *The Library of Utopia*, April 25, 2012, available at <http://www.technologyreview.com/featuredstory/427628/the-library-of-utopia/> (Last visited on October 13, 2012) (Both articles discuss this ideal as driving the Google Book Search project and, now, the Digital Public Library of America).

<sup>77</sup> 770 F. Supp. 2d 666 (S.D.N.Y. 2011); See also *American Society of Media Photographers, Inc. v. Google Inc.*, Civil No. 10-2977 (S.D.N.Y.) (This was an accompanying suit filed by a visual artists’ consortium alleging infringement of visual works in books).

<sup>78</sup> See, e.g., Randal Picker, *The Google Books Search Settlement: A New Orphan-Works Monopoly?*, 5 J. COMP. L. & ECON. 383 (2009).

terest effort, distributed across participating libraries would not meet the same fate. It could be argued that the experience with Authors Guild reinforces the case for a state-led, or at least public interest-oriented effort at the development of a universal digital library. Another point of instruction is that of the need for legislatures to proactively address issues in the intersection of copyright policy and new technology. With specific reference to universal libraries, requirements for permissions or licensing would have to be developed to make them feasible, given unprecedentedly large volumes of work.

At any event, it is not as if there is no alternative conceivable to the problems attendant in the mass-digitization project. There is the orphan works problem. There have been attempts (not yet successful) at legislating on the question in the United States, once in 2006<sup>79</sup> and then again in 2008.<sup>80</sup> These provided for reasonable compensation to located authors of orphan works, and for the setting-up of a database of such works. The EC has also attempted to answer the issues by way of a directive.<sup>81</sup> In a report on the copyright issues facing a project of mass digitization, the United States Copyright Office examined the Google Books dispute.<sup>82</sup> It examined a number of measures, including licensing systems in mass-digitization programs.<sup>83</sup> Favourable responses from courts in cases concerning mass digitization also afford cause for some optimism.<sup>84</sup>

## VIII. THE ASPIRATIONAL LIBRARIES EXCEPTION

While the need for a libraries exception is clearly recognized internationally, the exception, in the form that it is currently articulated, is at best, incomplete. The work of WIPO's Standing Committee on Copyright and Related Rights ('SCCR') in building consensus on the form of an appropriate international legal instrument dedicated to libraries and archival requirements from copyright law is an important indicator of the progress being made on this front.<sup>85</sup> It is intended that this work will fructify into recommendations to be placed before the WIPO's General Assembly in 2014. Notably, India's

<sup>79</sup> Orphan Works Act, 2006, H.R. 5439 (United States).

<sup>80</sup> Orphan Works Act, 2008, H.R. 5889 (United States); Shawn Bentley Orphan Works Act, 2008, S. 2913 (United States).

<sup>81</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF> (Last visited on February 7, 2013).

<sup>82</sup> Office of the Register of Copyrights, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document*, October, 2011, available at [www.copyright.gov/docs/massdigitization/USCOMassDigitization\\_October2011.pdf](http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf) (Last visited on January 5, 2013).

<sup>83</sup> *Id.*, 28-39.

<sup>84</sup> *Authors Guild v. HathiTrust*, Civil No. 11 CV 6351 (HB) (S.D.N.Y.).

<sup>85</sup> The Bangui Agreement Relating to the Creation of an African Intellectual Property Organization, Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property, 1977 (Official Translation) and the Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual

participation in the deliberations and its additions to the proposal has been significant.<sup>86</sup>

The libraries exception has been broken down into eleven separate heads in the SSCR's work.<sup>87</sup> These are: (1) preservation; (2) the reproduction right and the safeguarding of copies; (3) legal deposit; (4) library lending; (5) parallel importation; (6) cross-border uses; (7) orphan works, retracted and withdrawn works, and works out of commerce; (8) limitations on the liability of libraries (where they contravene copyright law, but have acted in good faith); (9) technological measures of protection; (10) contracts restricting the limitations and exceptions for libraries; and (11) right to translate.

A workable exception should necessarily cover all these heads. In addition, several valuable proposals were made during the course of the SSCR's deliberations that are worth highlighting. The United States referred to the need to clarify that the preservation right would extend to unpublished works as well, while the African Group included it in their proposal itself.<sup>88</sup> The United Kingdom referred to the need for format and technology neutrality (India already appears to recognize this requirement).<sup>89</sup> In the context of the reproduction right, India emphasized the need to create systems which allow inter-library document supply, while it also observed, importantly, that the scale of copying should not be capped but must involve a purpose-led determination of fair practice as Article 10 of the Berne Convention recognizes.<sup>90</sup>

On the question of legal deposit, India recognized the need for the requirement to extend to digital works and stated its intent to amend the law to extend the deposit obligation to such works.<sup>91</sup> There also appeared to be recognition of the need to look for means to preserve the cultural and social information not contained in books, but in websites, for instance.<sup>92</sup> Finally, the legal deposit was asserted to consist of two requirements, the first being deposit by private publishers and the second being the deposit of government documents.

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Property Organization (Official translation), available at [http://www.wipo.int/wipolex/en/other\\_treaties/details.jsp?treaty\\_id=227](http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=227) (Last visited on October 15, 2012).

<sup>86</sup> IFLA-EIFL-CLA Statement on Copyright Limitations and Exceptions for Libraries and Archives at SSCR 25, November 22, 2012, available at <http://www.ifla.org/news/ifla-eifl-cla-statement-on-copyright-limitations-and-exceptions-for-libraries-and-archives-at> (Last visited on December 30, 2012).

<sup>87</sup> See WIPO Standing Committee on Copyright and Related Rights, *Working Document Containing Comments On And Textual Suggestions Towards An Appropriate International Legal Instrument (In Whatever Form) On Exceptions And Limitations For Libraries And Archives*, August 8, 2012, available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=213607](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=213607) (February 8, 2013).

<sup>88</sup> *Id.*, 2.

<sup>89</sup> *Id.*, 3.

<sup>90</sup> *Id.*, 12.

<sup>91</sup> *Id.*, 21.

<sup>92</sup> *Id.*, 22.

The protection granted to libraries must in the interests of clarity and accessibility to the institutions themselves, if for no other reason, be enunciated in precise terms by statute. The need for legislative action is made all the more necessary by the fact that courts are often either ill-equipped to judge scientifically or holistically (being limited as they are, to the evidence before them) what the public interest would require or could yield the question to legislatures, whose function is to reconcile competing interests or at least provide the broad parameters for doing so.<sup>93</sup> Legislating towards truly balanced copyright systems has been a challenge. It must however be recognized and treated as a continuing process. Sustainable copyright will require legislators to consider the system holistically and in context, make simpler rules, take the long view, continuously monitor the impact of interventions and make course corrections as necessary.<sup>94</sup> And a revitalized fair use system, for libraries as well as for other institutional intermediaries, is of the first importance to its achievement.

The Indian provisions are limited and must be subject to closer legislative scrutiny and development if libraries must continue to create positive externalities for the communities in which they operate. In particular, there is a need for *clarity* in the provisions that already exist through closed definitions of the operative terms and for deliberate attention to be paid to the effect of our copyright system on the development of traditional as well as digital libraries.

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<sup>93</sup> ROBERT BURRELL AND ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 108 (2005).

<sup>94</sup> DEBORAH TUSSEY, COMPLEX COPYRIGHT: MAPPING THE INFORMATION ECOSYSTEM 115 (2012).

