

Copyright issues faced by libraries in the time of corona: An insight into the position under Malaysian Copyright Law

Sik Cheng Peng

Faculty of Law, University of Malaya,
50603 Kuala Lumpur, MALAYSIA.
e-mail: sikcp@um.edu.my

ABSTRACT

The COVID-19 outbreak has brought substantial disruption to life and many sectors at one stroke. The pandemic has forced the closure of many schools and universities across the world. With teaching and learning activities being shifted to an entirely online environment, libraries too, undergo dramatic changes in the way they deliver and supply materials. Libraries may meet the need and request for resources when people stay or work at home by either scanning the physical books in their collections, or to make available e-Books to a greater number of users. Nonetheless, the said two acts may trigger copyright issues. This research aims to explore the copyright challenges encountered by libraries when engaged in the said activities and seeks to suggest the possible approaches to be pursued by libraries in doing so. This research employs the doctrinal research methodology, the typical methodology for legal research. With the findings of this research, it is hoped that this paper may clear the air on the copyright concerns faced by libraries during the pandemic. In addition, the paper also strives to offer guidance to the libraries in Malaysia as to how they may perform their role during a virus outbreak without infringing copyright.

Keywords: E-Books; Copyright; Digitization; Remote Teaching and Learning; Balance of Interests.

INTRODUCTION

On the last day of 2019, World Health Organization (WHO) reported cases of pneumonia of unknown cause in Wuhan, China. In early January 2020, the cause of the pneumonia was identified to be a novel coronavirus, also known as COVID-19. Before long, cases of similar pneumonia were reported in Thailand, Japan, South Korea, and the United States. On 30 January 2020, WHO declared the COVID-19 outbreak a public health emergency of international concern. The outspread of the disease escalated into lockdown being imposed in many countries including Malaysia during which schools and universities were closed. The United Nations Educational, Scientific and Cultural Organization (UNESCO) reported that as of mid-April, 1.5 billion students were affected by school or university closures across the world (UNESCO 2020).

With the physical closure of schools and universities, teaching and learning have shifted to virtual classrooms or the online environment. A major challenge to educators, researchers, and students, all stranded at their own home, is to get access to suitable and sufficient resources. One of the ways for libraries to meet such need is to scan the physical books and send the digital files to the requesting educators, researchers, and students. However,

the act of scanning itself is an instance of reproduction over which copyright owners enjoy the exclusive right to control.

Given the difficulties of accessing physical books in the time of disease outbreak, e-Books are handy and may provide a relief to those in need of reference materials (Nicholas, Rowlands and Jamali 2010). The models of single user access and multiple users access dominate libraries' access to e-Books (Civic Agenda 2012; IFLA 2017). While it is fortunate that most academic and research libraries typically adopt the model of multi-user simultaneous access to e-Books, public libraries commonly apply the model of single user access or a limited number of users' access to e-Books (Xu and Moreno 2014; Ward, Freeman, and Nixon 2015). In the circumstances where only single user access or a limited number of users' access is available, e-Books may not be able to cater to the demand of numerous patrons or students looking for the same material simultaneously. The problem is particularly acute when the material concerned is one of the main references for a course. The availability of e-Books in some instances may also be restricted to campus only. In view of the potential barriers to e-Books in one way or another, the questions as to whether and how libraries may make them more accessible, legally and technically, would be pertinent.

Hence, this research explores the copyright issues arising in the two circumstances described above. The circumstances serve as a platform to examine the impact of digital technology on the balance of interests between copyright owners and the public. To date, most schools have reopened in Malaysia while many universities remain closed. Even with the reopening of the educational institutions, it remains a possibility that they may be ordered to be closed whenever there is a risk of new cluster of cases. Experts have predicted that the COVID-19 pandemic is probably to last two years (CIDRAP 2020). As such, it is crucial for libraries to be aware of the copyright issues that may arise in performing their function during the pandemic. Furthermore, it is vital that libraries are armed with the ability to cope with similar circumstances in future which call for a divergence from the norms without fear of litigation.

LITERATURE REVIEW

Libraries, Copyright Owners, and the Digital World

Libraries and copyright owners share many fundamental values and may work together to achieve common goals of promoting access to information and knowledge. Nonetheless, their interests and values sometimes clash with each other and the clashes magnify in the digital environment. A significant disparity between libraries and copyright owners may lie in how they view information and knowledge embodied in copyright works. The former view it as an essential public goods which should be made available at a reasonable cost while the latter regard it as private property that should bring commercial profits or rewards (Gasaway 2000).

Copyright law acknowledges the conflicting interests between the various stakeholders and strives to attain a balance of interests. The World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) expressly acknowledge the need to maintain a balance between the rights of authors and the public interest, particularly education, research, and access to information (WCT, Preamble; WPPT, Preamble). Exceptions to copyright including the fair dealing exception, and the exhaustion principle with respect to the distribution right are two examples of the

mechanisms under copyright law to strike a balance of interests. Nonetheless, attempts to uphold the balance is becoming more problematic and challenging in the digital environment.

Digital technologies and the Internet do increase the risk of large-scale copyright infringement and, thus, copyright owners resort to digital rights management to fence their digital works. Together with contracts, digital rights management may give copyright owners control over copyright works greater than which they are entitled to under copyright law (Bartow 2003). It is abundantly clear that these two may forestall the attempt of copyright law to keep a balance of interests.

The Right of Reproduction and Exceptions to Copyright

The right of reproduction is the most fundamental right enshrined in copyright law. It confers on copyright owners the ability to control the reproduction of their copyright works in any form, including the digital formats. Whereas the history of copying in libraries may be traced back at least to the Great Library at Alexandria in 290 B.C. (Gasaway 2010). It is noteworthy that there is no special exception for libraries and archives under international treaties on copyright including the Berne Convention for the Protection of Literary and Artistic Works (BC). Nevertheless, the BC provides room for a member country to provide further exceptions to copyright in certain special cases, provided they do not conflict with a normal exploitation of the copyright work, and do not unreasonably prejudice the legitimate interests of the author (BC, Article 9(2)).

Despite the absence of any special exception for libraries under international treaties on copyright, a study conducted by WIPO reported that 21 out of 191 countries implement a general library exception while 105 countries introduce a specific exception of making copies for library users. There are also many countries which enact special exceptions for preservation or replacement, research or study, document supply or interlibrary loan under their copyright legislations (Crews 2017). Indisputably, libraries play an essential role in guaranteeing and promoting the human right of accessing information and ideas as stated under the Universal Declaration of Human Rights (UDHR) (UDHR, Article 19), the more so in developing countries such as Malaysia. On top of that, another limitation to copyright of direct relevance to libraries is the fair dealing exception. Generally, the fair dealing exception excuses acts done for purposes of research, private study, criticism, review, or the reporting of current events, which require support and supply of resources from libraries.

The advancement of digital technologies has presented boundless potential which may transform how libraries serve their functions. Nonetheless, it has also brought to the fore the tension between copyright protection and the public interest in immense dissemination of information (Travis 2006). The Google Books lawsuit which involves the creation of digital libraries and Google Books search is probably the best illustration of such friction. The legality of scanning or digitizing physical books by libraries depends on whether the manner and objective of such act fall within the parameters of 'fairness', which in itself has been criticized for its ambiguous and complicated interpretation (Crews 2001).

The Right of Distribution and its Exhaustion

Traditionally, the right of distribution allows copyright owners to control the circulation of copies of their works. However, this right is confined to only the first instance of dissemination of the copies. In other words, the right of distribution is exhausted upon the

first sale or transfer of ownership of those copies. In addition, copyright owners enjoy the right to control only commercial rental of their works. As a result of the exhaustion of the distribution right as well as the restricted right of commercial rental, libraries *own* the copies of copyright works which they acquire and thus could freely lend books to the public. The exhaustion of the distribution right is pivotal to the presence of lawful secondary markets from which the libraries may legally obtain cheaper used copies or receive donated copies from the public (Bartow 2001).

However, the said limitations on the copyright owners' exclusive rights may not operate in the digital environment (Calaba 2002). The problems with attempts to invoke the same limitations in relation to copyright works in digital forms such as e-Books have been exacerbated by the prevalent use of licensing agreements and digital rights management by copyright owners (Bartow 2001). Licensing agreements may prescribe software purchasers as mere licensees, instead of owners, with the effect of preventing the acquisition of software from being regarded as a sale or transfer of ownership. This has the effect of pre-empting the operation of the exhaustion principle on the distribution right (Klinefelter 2001). Accordingly, licensing agreements convert digital information from a product to a service in respect of which libraries enjoy little autonomy (Bartow 2003).

In addition, digital rights management such as encryption tools applied to the digital copies of copyright works may impose technical obstacles to the meaningful functioning of the exhaustion principle as well as libraries' traditional lending right. As a result, contractual obligations and the technological tools adopted by copyright owners, rather than the rules of copyright law, may ultimately determine how libraries could carry out their tasks in relation to lending, copying, and archiving (Cichocki 2008).

OBJECTIVES AND METHOD

This research aims to examine the copyright issues arising in the performance of tasks by libraries during a pandemic such as the COVID-19 outbreak. It focuses on two acts that may be undertaken by libraries in their efforts to ensure and increase remote access to library resources while the premises stay closed: first, the act of scanning physical books and making available the digital scans; and second, the dealing with e-Books. This research has libraries in educational institutions and copyrighted educational resources as its centre of attention. It seeks to answer the research questions as follows:

- 1) What is the legal position of scanning physical books by libraries done during the pandemic under Malaysian copyright law and whether it is 'fair' to do so?
- 2) What are the legal concerns and restraints faced by libraries in dealing with e-Books during the pandemic in the context of Malaysian copyright law?
- 3) From the discussion on (1) and (2) above, what are the key points that may be derived which could in turn serve as guidelines for libraries as to (i) how libraries may deal with copyrighted materials during the pandemic in line with copyright rules; and (ii) how libraries should negotiate in acquiring copyrighted resources in future?

This study adopts doctrinal research methodology which is the core legal research method by explaining and examining legal concepts and principles of cases, statutes, and rules (Hutchinson and Duncan 2012). This method offers a systematic exposition of the legal rules and analyses the relationship between rules. It is useful in expounding areas of difficulty and sometimes may even foretell future developments (Hutchinson and Duncan 2012). Given the focus of this research on the challenges faced by libraries during the

pandemic, this research embraces problem-based methodology which is most suitable to solve a specific legal problem (Van Hoecke 2011). Essentially, this involves identifying the legal issues in the two circumstances as described above, followed by analysing the issues with the object of discovering the primary materials such as legislation and case law. The issues will then be synthesised in context before a conclusion may be reached (Hutchinson and Duncan 2012).

This research zooms in on the legal questions identified in the abovementioned instances under Malaysian copyright legislation, namely the Copyright Act 1987 (CA 1987). To help understanding the copyright principles better, reference is made to the relevant case law. Case law is a primary material for legal research as it embodies the courts' interpretations and rulings on the legislations, and it has a binding effect on the courts in hearing similar legal questions. Foreign case law may be referred to when local case law is absent since the basic principles of copyright law are relatively standardized due to the presence of various international treaties and trade agreements. In examining the legislation and case law, techniques including deductive logic and inductive reasoning are applied (Farrar 2010). The legal position of the libraries' acts as described above may be reasoned and deduced from the legislation as well as case law which would in turn throw light upon the difficulties encountered by libraries in discharging their duties during the pandemic as well as the possible options they may pursue in future.

COPYRIGHT OWNERS' EXCLUSIVE RIGHTS & LIBRARIES EXCEPTIONS UNDER MALAYSIAN COPYRIGHT LAW

Copyright owners enjoy the exclusive right to control the reproduction in any material form of their copyright works (CA 1987, section 13(1)(a)). The right extends to reproduction in any form or version, whether visible or not, including digital formats (CA 1987, section 3). Copyright owners may invoke the right not only when the whole of a copyright work is reproduced, but also when the use involves only a part of the work as long as the part taken is substantial (CA 1987, section 13(1)). Substantiality is a question which takes into account the skills and labour expended in creating that part; the objective of using that part; and whether the part taken competes with the original work (*Longman Malaysia Sdn Bhd v Pustaka Delta Pelajaran Sdn Bhd* 1987).

In addition, copyright owners are entitled to control the distribution of copies of their works to the public by way of sale or other transfer of ownership (CA 1987, section 13(1)(e)). Yet, this right is qualified to be applicable to the first instance of distributing the copies (CA 1987, section 13(1)(A)). This is also known as the principle of exhaustion which enables libraries to lend books without the need of obtaining consent from copyright owners and without infringing copyright (Khaw 2004). Nonetheless, it may be said that the exhaustion principle does not run in full force since it is specifically stipulated that copyright owners enjoy the right over the commercial rental of their works to the public (CA 1987, section 13(1)(f)). Nonetheless, the right of commercial rental does not affect non-profit libraries' lending activities (Khaw 2004).

In respect of the distribution right, there is no express provision in the CA 1987 to qualify it to apply only to tangible copies. Therefore, arguably, the distribution right extends to both tangible and intangible copies, including digital copies. It follows from this argument that the exhaustion principle should work in the same manner regardless of the copy involved is contained in a tangible or intangible object. Be that as it may, the position may not be so

clear-cut having regard to the fact that Malaysia is a contracting party to the WCT which states that 'copies' in the context of the right of distribution and the right of rental shall be understood to refer exclusively to 'fixed copies that can be put into circulation as tangible objects' (WCT, Agreed Statements concerning the WIPO Copyright Treaty). It seems that copies which take the form of intangible objects are intended to be governed by the other exclusive right of copyright owners, namely, the right of communication to the public. The right of communication to the public covers all forms of making available copyright works via wire or wireless means, including the Internet (WCT, Article 8; CA 1987, section 13(1)(aa)). Unlike the right of distribution, the right of communication to the public is not subject to the principle of exhaustion.

On the other hand, the CA 1987 also prescribes acts which are not subject to the control of copyright owners. There is a special exception in favour of public libraries and educational, scientific, or professional institutions in respect of any use made of a copyright work by them subject to the fulfilment of several requirements (CA 1987, section 13(2)(i)). First, the use is in the public interest. Second, the use is compatible with fair practice and any regulations. Third, there is no profit generated from the use. Fourth, there is no admission fee charged for the performance, showing, or playing of the work used, if applicable. It is worth mention that the special exception is applicable only to public libraries, archives and educational, scientific, or professional institutions as specified under the Copyright (Public Libraries and Educational, Scientific or Professional Institutions) Order 1987.

In addition, the fair dealing exception may also be relevant for libraries in delivering their services (CA 1987, section 13(2)(a)). The 2012 Amendments to the CA 1987 have turned the fair dealing exception into a more flexible and open-ended defence by untying the object of a dealing from only a few specified purposes. In substance, the determining criteria for the applicability of the fair dealing exception is the 'fairness' of an act. To decide whether a use made of a work is fair, the court shall consider at least four factors (CA 1987, section 13(2A)). First, the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes. Second, the nature of the copyright work. In general, copyright law tolerates uses made of factual works compared to fictions or creative works. Third, the amount and substantiality of the portion used in relation to the copyright work. Fourth, the impact of the dealing on the potential market or value of the copyright work shall also be considered.

The weighing of these factors in deciding the fairness of a dealing itself demonstrates copyright law's endeavour in holding a balance of interests. It is noteworthy that the special exception in favour of libraries also requires the consideration on the fairness of a use made of a copyright work, namely whether the use is in the public interest and whether it is compatible with fair practice. Plainly, while the said exceptions to copyright may come to libraries' rescue, they come with strings.

Copyright works in digital forms, including e-Books, are by and large protected by digital rights management. Two categories of digital rights management enjoy protection under the CA 1987. They are first, technological protection measures (TPMs) applied to copies of copyright works such as encryption; and second, electronic rights management information (ERMI) contained in copies of copyright works such as watermarks. In essence, the legal protection over TPMs is comprised of prohibition on the circumvention of TPMs and prohibition on commercial trading activities in relation to tools used to circumvent TPMs (CA 1987, section 36A(1) & (3)). Whereas the protection over ERMI lies in the

prohibition on unauthorized removal of ERMI and dissemination of copies of copyright works of which ERMI has been so removed (CA 1987, section 36B(1)).

The prohibited acts relating to TPMs and ERMI are separate from and independent of copyright infringement. Accordingly, the exceptions to copyright such as the special exception for libraries and the fair dealing exception are inapplicable to the prohibited acts (Sik 2020). There are several exceptions to the prohibited circumvention of TPMs (CA 1987, section 36A(2)). Among the exceptions, there is a special exception in favour of libraries, archives, or educational institutions if the circumvention is done solely for the purpose of making an acquisition decision on the copyright work concerned (CA 1987, section 36A(2)(f)). A similar exception is available to the same entities for the same purpose in respect of unauthorized removal of ERMI (CA 1987, section 36B(2)(b)). There is no exception to the prohibited commercial activities with respect to circumvention tools or services.

RESULTS AND DISCUSSION

The principles of copyright law discussed in the earlier section are applied to address the research questions.

Research question 1: What is the legal position of scanning physical books by libraries done during the pandemic under Malaysian copyright law and whether it is 'fair' to do so?

Generally, public libraries and libraries in certain educational institutions are sheltered from the reach of the right of commercial rental, considering the non-commercial nature of the lending they are engaged in. The exhaustion principle prevents copyright owners from exercising the rights of distribution over the copies of copyright works after libraries have purchased them. Nevertheless, the exhaustion principle only operates with respect of the right of distribution, not the other exclusive rights such as the right of reproduction. The act of scanning physical books resulting in digital copies falls within the scope of reproduction and thus subject to copyright owners' control. It may trigger the right of reproduction notwithstanding the copying may involve only a portion of the copyright work if the portion is substantial. However, when only an insignificant portion is copied, the law views it as too trivial or minor to impose liability. In addition, there is little doubt that the sending or transmission of the digital scans to educators, researchers, and students is caught under the right of communication to the public.

On the face of it, scanning physical books and delivering the digital scans fall within the copyright owners' rights to control. Nevertheless, such acts are carried out by libraries to meet the needs of educators, researchers, and students for teaching, learning, and research during the pandemic. The issue germane and central to the research question here is, therefore, whether any exception to copyright may shelter libraries from liability for copyright infringement. The special exception in favour of libraries which is discussed in the preceding section appears to be general and broad enough to cover any use made of a copyright work by libraries, including the scanning of books. Libraries do so to equip the educators, researchers, and students with appropriate resources for educational or research purposes without gaining profit from the digital scans. Such act should also meet the requirement of public interest. It is axiomatic that there is a pressing public interest in doing so which helps ensuring teaching, learning, and research activities to be continued at the time when educators, researchers, and students are instructed or encouraged to stay at home with no access to the physical collections of libraries.

However, libraries should do so in a manner that is compatible with fair practice. It is unclear as to what constitutes a fair practice. As stated in the preceding section, the fair dealing exception may also be applicable to libraries provided they fulfil the fairness requirement. 'Fairness' is the crucial and common condition for both exceptions. The factors listed in section 13(2A) of the CA 1987 offer important clues as to what may amount to a 'fair' practice or a 'fair' dealing. The fact that the scanning is done with the objective of facilitating research, teaching, and learning at the pandemic favours a finding of fairness, especially so when it is for non-profit educational purposes. The factor regarding the nature of the copyright work seems to favour the act to be excused as well since the works involved are largely educational materials including textbooks and reference books.

The amount and substantiality of the portion used is an aspect worth due attention from libraries. It is cardinal to ensure that the extent of copying is only as much as necessary for the educational or research purposes. In some peculiar circumstances such as search engine services, even the copying of a copyright work in its entirety may be necessary and thus fair (*Kelly v Arriba Soft Corp*, 2003; *Authors Guild, Inc v Google, Inc*, 2015). However, this should not be taken as the general rule. Lastly, in making the digital scans, librarians shall also bear in mind the effect of such copies to the economic interests of copyright owners. There should be made clear the terms and conditions for the use, particularly that the copies shall not be disseminated widely to anyone other than the educators, researchers, and students for whom the digital copies are made. Otherwise, the copies may be said to be substitutes for the original copyright works and thus deprive the copyright owners the profit they would otherwise be entitled to.

Research question 2: What are the legal concerns and restraints faced by libraries in dealing with e-Books during the pandemic in the context of Malaysian copyright law?

The copyright concerns arising in relation to e-Books appear more complex than that with regard to the scanning of physical books as discussed above. Above all else, it is unclear as to how the exhaustion principle on the right of distribution will be interpreted by Malaysian courts in the context of digital copyright works. To date, there is no local case law on this issue. Hence, reference is made to the foreign case law.

In the United States, the court upheld the validity of software license agreements and that the consumers are merely licensees instead of owners of the copies of software (*Vernor v Autodesk, Inc* 2010). Since the transaction involved is a license rather than sale or other transfer of ownership, the right of distribution is not exhausted. Similar issues arose regarding the legitimacy of a second-hand digital music platform in the United States. It was held that the processes of uploading and downloading a copy of music inevitably involve reproduction to which the exhaustion principle has not application (*Capitol Records, LLC v ReDigi Inc* 2018).

By contrast, the Court of Justice of the European Union (CJEU) had construed software license agreements as 'sale' and thus the exhaustion principle applied (*UsedSoft GmbH v Oracle International Corp* 2012). However, in addressing the issues concerning the legality of Tom Kabinet, an online market for second-hand e-Books, the CJEU limited the *UsedSoft* decision to computer programs as distinguished from other digital works (*Nederlands Uitgeversverbond/Groep Algemene Uitgevers v Tom Kabinet* 2019). The CJEU referred to the *WCT Agreed Statements* that the right of distribution is confined to fixed copies in the form of tangible objects and thus excluding intangible works such as e-Books. It went on to hold that the supply to the public by downloading for permanent use of e-Books such as

the service offered by Tom Kabinet in the case falls within the breadth of the right of communication to the public, which is not subject to the exhaustion principle.

As for the legal position in Malaysia, despite the absence of any express provision to restrict the right of distribution only to tangible objects, the issues are likely to be addressed similarly taking into account the fact that Malaysia is also a contracting party of the WCT. The effect of precluding the right of distribution from application to intangible objects is that the exhaustion principle becomes irrelevant in respect of digital copyright works. This has significant bearing on libraries as it means libraries do not become owners of the copyright works which they acquire. It follows that what libraries may do with the copies of copyright works is governed by the licensing agreements they enter.

Accordingly, libraries may not lawfully deal with e-Books as how they may be able to with respect to physical books. For instance, libraries may be subject to licensing agreements which permit the concerned e-Books to be accessible to only a user at one time, campus only, or only on specific platforms or devices (Aaltonen et al. 2011) . Manifestly, this imposes restrictions on libraries' lending of digital copyright works during the lockdown. If libraries attempt to supply e-Books against the usage terms, they are likely to be engaged in reproduction or communication to the public of the works as illustrated in the United States and the European Union case law discussed above.

On top of that, libraries would face technical obstacles in any attempt to make the e-Books more accessible. Digital copyright works are generally protected by TPMs or ERMI. Bypassing a TPM or removing an ERMI from a copy of a copyright work without the copyright owner's consent may result in liability. Though there are special exceptions to the prohibited acts relating to TPMs or ERMI in favour of libraries, the ambit of the exceptions is rather narrow. The exceptions rule out libraries' liability only if the prohibited acts are done for the sole purpose of making an acquisition decision on the copyright work (CA 1987, section 36A(2)(f) and section 36B(2)(b)). Clearly, the exceptions would not be able to be invoked when such acts are performed by libraries during the pandemic to satisfy the wants of educators, researchers, and students for educational or research purposes.

Research question 3: From the discussion on (1) and (2) above, what are key points that may be derived which could in turn serve as guidelines for libraries as to (i) how libraries may deal with copyrighted materials during the pandemic in line with the copyright rules; and (ii) how libraries should negotiate in acquiring copyrighted resources in future?

(i) How libraries may deal with copyrighted materials during the pandemic in line with the copyright rules

From the discussion on research question 1 above, 'fairness' stands out as the most critical condition for either the special exception for libraries or the fair dealing exception. The minimal four factors to be considered in deciding 'fairness' in respect of the fair dealing exception may serve as guidelines for libraries' practices. Among them, the amount and substantiality of the portion used as well as the effect of the dealing on the potential market or value of the copyright work are the most material aspects that libraries must keep in mind in contemplating the actions to be undertaken during the pandemic. The extent of copying or reproduction of a copyright work should be justified by the purpose and character of the usage. Besides, there should be efficient restraints on the accessibility of the copies made to avoid unwarranted detriments to copyright owners. The four factors

should serve as the basis of risk assessment by libraries in accomplishing their mission all the time.

The strength of a freewheeling fair dealing exception such as that found in the CA 1987 is its flexibility. Nonetheless, flexibility requires a case-by-case evaluation which may thus result in ambiguity. The lawsuit filed against the Internet Archive lately may be yet another example of the uncertainties (*Hachette Book Group, Inc v Internet Archive 2020*). The operation of the Internet Archive is based on the model of 'controlled digital lending' with technical restrictions placed on redistribution of the copies by the patrons and in line with 'owned-to-loaned' ratio. With the COVID-19 outbreak, the Internet Archive suspended the waitlist for e-Books to allow simultaneous access by multiple patrons. It remains to be seen whether the 'controlled digital lending' would be accepted as fair dealing of copyright works. However, when the Internet Archive abandoned the waitlist, it has moved closer to, or may have indeed transgressed, the boundaries of the fair dealing exception. It is open to argument whether offering access to complete digital works is fair especially where this may affect the markets of licensing e-Books.

Libraries may be justified in scanning physical books for their patrons' needs given the critical roles they play in supporting remote teaching and online in exigent circumstances. There is a strong public interest to do so to ensure the availability of educational resources in times of emergency especially where the physical books are not available in e-Books formats. However, they must carefully weigh the options of making the digital copies available so that they do not cross the line. Appropriate technical controls should be placed on the digital copies to minimize the damage to the interests of authors and copyright owners.

A prudent and sensible course of action for libraries to pursue in the wake of COVID-19 is to call upon the copyright owners, mainly publishers, to relax copyright restrictions and to lift the usage constraints in the licensing agreements such as campus only access or the limits on simultaneous users. This approach is desirable as even if libraries may be able to rely the exceptions to copyright successfully, there is no guarantee that they would not be entangled in the lawsuits for breach of contract or the prohibited acts relating to TPMs or ERMI.

(ii) How libraries should negotiate in acquiring copyrighted resources in future

One may notice that physical books and e-Books give libraries freedom of dealing with them in varying degrees. While e-Books have the advantage for the remote access they enable, they are supplied to libraries in the form of 'service' which is continually governed by licensing agreements (Zhu and Shen 2014). Hence, how libraries may deal with e-Books in times of crisis may be greatly circumscribed. The digital rights management applied to e-Books worsen the problems further. While the differences between the two appear to be immutable now, libraries should be mindful of the restrictions of each and may make good use of them in negotiating licensing agreements for future procurements.

One of the valuable lessons to be learned from the pandemic is the significance of exceptions to copyright as well as the exceptions to the prohibited acts relating to TPMs and ERMI. It is clearer than ever that it is paramount and useful to have versatile exceptions to copyright such as the fair dealing exception, particularly so during the pandemic. Accordingly, libraries should ensure the licensing agreements they enter in future do not rule out or diminish the exceptions under copyright law. Considering the uncertainties surrounding the fairness requirement of the exceptions, express provisions in

licensing agreements would be expedient. It is advantageous to state explicitly in licensing agreements that copyright control will be loosened in times of crisis and that copyright owners will support libraries in fulfilling their responsibilities. In addition, such clause should ideally incorporate a waiver of rights over the TPMs or ERMI applied to digital works by the publishers if necessary. A measure as such could help establishing new copyright norms.

CONCLUSION

The physical closure of premises accentuates frailties of the current copyright law which may force libraries to walk a tightrope in attempt to provide remote access to their collections. It is high time to pay greater attention to the role of copyright in education and research, particularly how it may impede libraries from accomplishing their mission of supporting and facilitating education and research activities. Serious consideration should be given to the introduction and recognition of the exhaustion principle in the digital environment. This research also identifies the problems with the narrowly phrased exceptions to the prohibited acts on digital rights management which should be rectified. There is no better time than now to rethink the balance, or imbalance, of interests between copyright owners and the public under copyright law.

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