

# Copyright Bulletin

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## Licensing or Copyright Law? A Battle for Control of the Library 'Shelf'

Once upon a time, libraries were relatively simple affairs, legally speaking. Librarians bought books and periodicals, placed them on shelves according to a highly-organised system and let people look at them and even borrow them. It wasn't necessary to know much about copyright law because this routine library practice didn't involve copyright-protected acts. Only if you were engaged in document supply or had the need to prevent an over-eager patron from copying half-a-shelf was copyright an issue.

But with the advent of electronic resources, this old simplicity has gone. There is no digital equivalent of plucking a book from a shelf and leafing through it, as far as the copyright law is concerned. Every time an electronic document is opened, and temporary copies made on the screen and in the computer's memory, that's a 'reproduction'—just as an article copied on a photocopier is a reproduction.

Every time an electronic document is emailed from one workstation to another inside a library, that too is a reproduction.

*continued on page 2*

## In this Issue of the Copyright Bulletin...

The main topic for this issue of the *Copyright Bulletin* is a look at the different and sometimes conflicting roles played by the copyright law and contract law (as expressed in licence agreements).

As many librarians would be aware, licence agreements governing library resources are becoming more and more common; in an article beginning on this page, I examine the nature of licence agreements and look at how conflicts with the copyright law may be resolved.

Of course, another Federal Election has come and gone, with the Howard Government returned to power. An article beginning on page 6 looks at some of the new (and not so new) proposals of the (not so) new Government.

On the international front, the International Federation of Libraries and Library Institutions (IFLA) follows copyright and licensing issues through its Committee on Copyright and Other Legal Matters (CLM). CLM meets once a year at each IFLA conference. On page 4, you can read an account of the last meeting of the Committee, in Boston.

If you have any legal issues which you think the Committee should address at its next meeting in Glasgow in 2002, please drop me a line and let me know.

The back page contains the obligatory disclaimer (IAALBTINLA – I am a lawyer but this is not legal advice) as well as links to further information (and the online edition of the *Copyright Bulletin*). There is also an attempt at copyright humour... ▪

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The lesson to be learned here is that, in the electronic environment, copyright cannot be avoided.

For just about any use of an electronic document (or image or audio-visual item), you need either: some kind of licence from the rights-holder or an exception under the *Copyright Act 1968*. I'll explore the nature of licences and exceptions before looking at the emerging relationship between the two.

### Licences

Any time that you are given permission to use a copyright work in a way that would otherwise be an infringement of the law, this is a licence. A licence may be either express or implied.

An express licence is an explicit statement allowing you to do something. For example, 'You may copy my article.'

An implied licence refers to the permission to use a copyrighted work that is implied as a result of some act or conduct on the part of the copyright holder. For example, writing a letter to the editor of a newspaper impliedly gives the editor permission to reproduce your letter in the newspaper. An implied licence can easily be overridden by an explicit statement. You could accompany your letter to the editor with a statement saying: 'this letter may not be printed in the newspaper.' If the editor went ahead and printed it anyway, you could sue for infringement.

It is not always clear what exactly is impliedly permitted by such a licence. Following the commencement of the Digital Agenda Act, a brief media storm erupted in the *Daily Telegraph*, along the lines of 'forward an email, go to jail'. The response from the Government was that emails would rarely be protected by copyright because they lack sufficient originality (a somewhat dubious claim). A better response would be that emails are covered by implied licences; that when an email is sent, unless it is marked confidential in some way, there is an expectation that it will be forwarded on. This

routine practice gives rise to an implied licence with respect to emails. But what exactly does this implied licence permit? Forwarding a work email on to other colleagues would seem to be fine but can a personal email be forwarded on to a public mailing list? Arguably not.

Another example which highlights the uncertainty surrounding implied licences is the World Wide Web. Material on the web is protected by copyright in the same way as any other work. However, it is impossible to read a web page without making temporary copies of it. For this reason, viewing the web is certainly covered by a (rather strong) implied licence. But does this licence cover printing also? And what about making a copy of a site to read on your laptop when you're offline? Some argue that these uses are covered by an implied licence while others argue that they are not.

It is possible to work out, to some degree, the scope of the implied licence by looking at the clues given by the website. If a site says: 'click here for a printer-friendly version', then this can be construed as an implied licence to print a copy. But often the nature of what is permitted by an implied

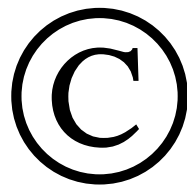
licence will be unclear.

An express licence is to be preferred but, of course, an express licence will not always be granted. And it may come with conditions attached (but more of that later).

### Exceptions

Exceptions to the rights of copyright owners under the Copyright Act enable libraries and their patrons to do many useful things with works in a library's collection without permission and for free.

(The previous edition of the *Copyright Bulletin*, #17, October 2000, illustrates in detail many of the new exceptions contained in the Digital Agenda Act).



*versus*

**Contract**

For example, a patron can copy a portion of a work for research or study (fair dealing for research or study, section 40). They may be able to copy the whole work for research or study if the work is not commercially available.

Similarly, a library may supply material (typically 10% or a chapter or an article) to a patron or another library under ss. 49 and 50, subject to certain requirements. (Note that this is different from fair dealing). While these provisions are useful, they do not cover many of the uses that libraries need or will need in the future. These might include the installation of a computer program on a library PC or lending e-books to patrons via email. (The ability to supply 10% of an e-book might not satisfy very many patrons).

So for libraries to provide electronic services to their patrons, they need to make use of a combination of (express) licences and free exceptions.

Licences typically have to be purchased just as books are purchased. The principal difference, however, is that what you may do under a licence may vary tremendously. With a book or a periodical, the price may vary, but the possible uses that you are allowed will not: you can put it on a shelf; you can make it available or lend it; you can use it for document supply, etc. But with an electronic book, the exact uses that are covered by a licence may vary according to a number of factors, not the least of which is how much money you have. For example, a licence might allow two simultaneous users to access an electronic resource; a more expensive licence might allow ten.

#### *Licence Agreements as Contracts*

A contract is a binding legal agreement between two or more parties. We enter into contracts all the time. Even the purchase of groceries is a contract; in return for money, the supermarket agrees to supply us with food. If they refused to deliver your groceries (if that was agreed), you could sue them for breach of contract.

This is a very simple type of contract. We are more accustomed to contracts that take the form of written agreements.

The difference between a licence and a contractual licence agreement is that a mere licence is a unilateral affair; for example, you might ask a writer if you can use her article in

your anthology. If she says yes, you can include the article. However, if she later changes her mind (revokes her licence) there is little you can do about it. However, if you have a contract with that writer (and money or something else of value changes hands) and she changes her mind, you can sue her for breach of contract.

#### *Copyright vs Contract*

Library resources are increasingly being sold as part of contractual licence agreements. This means that the agreement constitutes a licence for the uses that you need that are not covered by exceptions (or that are not otherwise free of copyright, such as the lending of a physical book).

This doesn't sound so bad. Exceptions for some uses, purchased licences for other uses; where is the battle for control referred to in the headline?

Because increasingly licence agreements aren't just setting down conditions for use when the exceptions do not apply, they are also purporting to *override* exceptions.

Some publishers have taken the approach of 'why allow libraries to copy articles and send them to patrons for free when we can require them to pay?' Others have apparently been afraid that library activities would undercut their markets and so have tried to constrain these activities.

Exceptions such as library document supply or fair dealing are created by the Commonwealth Parliament for the use of libraries and their patrons. The Australian Libraries Copyright Committee's position is that these exceptions are an important part of public policy and should not be undermined by private contractual agreements. (Some commentators called these agreements where libraries or other parties waive their legal rights as 'private legislation').

In contrast, those supporting these types of licence agreements assert that all parties enter into them freely and that the parties' 'freedom of contract' should not be taken away by the Government. Furthermore, they argue that allowing parties to 'contract out of' some rights they don't need so as to be able to bargain for rights they do need is more efficient.

This is the essence of the conflict between copyright law and contract law. The actual position of the law on this subject has been uncertain for a while. (Continued on page 7)

## **IFLA's Committee on Copyright and Other Legal Matters: an Introduction**

As all librarians probably know, the International Federation of Library Associations and Institutions (IFLA) is the world's peak body representing libraries and librarians. Founded in Edinburgh in 1927, it will celebrate its 75th birthday at the conference scheduled to take place in Glasgow in 2002. It has 1622 Members in 143 countries around the world and is based in The Hague in the Netherlands.

Different library interests are divided into divisions, sections or roundtables, according to geography, the type of service or a particular discipline. However, some activities are called 'core activities', not because they're more important but because they cut across the whole library sector. One such 'core activity' is the Committee on Copyright and Other Legal Matters (CLM); others include the Committee on Free Access to Information and Freedom of Expression (FAIFE) and Preservation and Conservation (PAC).

CLM was formed by a resolution of the IFLA Council at its meeting in Copenhagen in 1997. Previously, IFLA had benefited from a Copyright Advisor who represented IFLA with respect to copyright: preparing submission papers, attending meetings and providing briefings to the IFLA executive. The importance of this position in coordinating IFLA's lobbying efforts led the organization to consider how best to address copyright questions in the future. (The position of Copyright Advisor has since apparently been discontinued).

Accordingly, it was decided to establish a committee comprised of copyright specialists to advise IFLA and its constituent groups on

intellectual property issues as well as a variety of other legal issues, including:

- Economic and trade barriers to the acquisition of library materials;
- The World Trade Organisation;
- disputed claims of ownership of library materials (such as materials taken by imperial powers or by occupying military forces); and
- subscription and license agreements.

CLM has met at every IFLA conference since then (Amsterdam, Bangkok, Jerusalem, Boston). The Boston meeting (which was my second IFLA and CLM meeting) featured a number of useful discussions of copyright issues. The conference itself had several CLM-sponsored sessions such as:

- 'Privacy in the digital environment: issues for libraries';
- 'Digital rights management: threat or opportunity in the digital age' (from Japan, a discussion of DRM in the e-book context);
- 'Licence fees: barrier or opportunity for access to electronic content?' (a paper by presented by UK CLM member Graham Cornish);
- 'WIPO - Advancing Access to Information for Print Disabled People' (an excellent account of UK/EU progress towards exceptions for the visually impaired); and
- Updates on the proposed Hague Convention (a treaty to make foreign civil judgments enforceable in local courts) and the new EU Copyright Directive (roughly equivalent to our Digital Agenda Act).

Professor Peter Jaszi of American University was also one of the four keynote speakers of the Conference. He gave a very informative speech which outlined many of the challenges to the copyright balance presented by the US Digital



Millennium Copyright Act (their equivalent to the Digital Agenda Act). While aimed at a general library audience, it was a good overview of recent developments.

The Committee on Copyright and Other Legal Matters had 2 business meetings at IFLA Boston which were very successful. They included updates of copyright developments around the world, during which I gave a summary of the Digital Agenda Act and foreshadowed the CLRC Copyright and Contract reference which greatly interested Committee members. *[See the article in this issue: 'Licensing or Copyright Law' for more information on this reference.]*

The growing importance of World Trade Organisation matters was raised and a draft IFLA policy paper on the WTO was written by Paul Whitney of Canada and workshopped by Committee members. It was decided that a WTO resource area would be set up on the CLM website. The new(ish) IFLA Copyright and Licensing position papers were finalised and their possible uses discussed.

The meetings closed with a discussion of future work for the Committee. One possible project will be the development of a model copyright law for the digital age – both as a lobbying aid for the developed world and as a guide of the developing world in enacting new copyright legislation (in some cases for the first time).

I also participated as part of a four member IFLA Committee of Experts in a meeting with a corresponding group from the International Publishers Association (Lex Lefebvre, Secretary General STM; Mark Seeley VP and General Counsel Elsevier Science; and Benoit Muller, Secretary General IPA). It was an attempt to resolve differences prior to the joint IFLA/IPA steering committee meeting. It was a useful

opportunity to put our views to publishers. We reaffirmed core library values and asserted that although some things may change in the transition to a digital environment, underlying principles of access to knowledge should not be affected.

The joint IFLA/IPA steering committee later made a public statement. While obviously publishers and librarians will tend to disagree on a number of (important) issues, they also share a number of common principles such as a commitment to the widest possible distribution of knowledge. The statement manages to reconcile the difficult issue of whether 'digital is different' (as the famous copyright slogan goes) by asserting that in some ways digital is different and in some ways it is not. Yes, digital is different in the sense that new technologies have

fundamentally changed methods of publication and dissemination. But no, digital is not different in the sense that the fundamental principles underlying copyright protection in the print environment remain the same in the electronic environment.

You can read the joint statement here:  
<http://www.ifla.org/V/press/ifla-ipa.htm>

The work of CLM is likely to become more and more important as the world's libraries are increasingly forced to engage with a complex IP and licensing environment. I look forward to the next meeting of CLM.

More information about the membership and activities of CLM can be found at:  
<http://www.ifla.org/III/clm/index.htm> ▪



## Coalition Parties' Copyright Policy – Election 2001

Meet the new Government, same as the old Government. Obviously with the Coalition Parties being returned to Government, copyright policy is unlikely to be altered as much as it might have been had the ALP been elected.

However, there are a few points to note in the Coalition election policies.

The Coalition re-iterated the need for balance between copyright owners and users. This has (fortunately) become something of a mantra in Australian politics over the last few years. Parties of all persuasions are always keen on this mystical 'balance'—even if no one is exactly sure how it is to be struck.

The Coalition statement of the need for balance was slightly stronger than that of the ALP, with an explicit recognition of the role of libraries. From the Coalition's

*Information Economy Policy:*

'The Coalition is committed to maintaining a balanced and workable copyright regime for the digital age, one that encourages creativity and innovation while maintaining reasonable public access to copyright material.'

'Through the Digital Agenda reforms, Australia became one of the first countries in the world to meet new international standards on copyright and the Internet. In addition to creating enhanced protection for copyright owners, Australia's world class digital copyright regime now sets the legal framework for those involved in the creation, transmission, and use of digital copyright materials, including artists, Internet service providers, libraries and educational institutions, scientists and researchers.'

More specifically, from the same policy, the Coalition also affirmed its commitment to

reintroduce legislation to remove parallel importation on books and software (as it has done for CDs). This Bill foundered in the last Parliament following strong opposition from the ALP and Democrats. Given that the Government again does not have control of the Senate, this legislation is not likely to progress very far.

The Coalition also committed itself to: 'enhancing enforcement mechanisms and increasing awareness and understanding of intellectual property in order to strengthen Australia's IP system.' It further added that increased awareness of intellectual property would be partially achieved through the simplification of the Copyright Act. Proposals for simplification of the

Act were contained in the Copyright Law Review Committee's Simplification Report which the Government is yet to respond to.

The long-standing commitment to review the Copyright Act in light of new technologies was restated. No time-frame was given in the *Information Economy Policy* but past statements have put this at within 'three-

years' of the Digital Agenda Act's commencement.

The final copyright commitment stated in this policy is to 'support the development of innovative digital rights management solutions and [the Government] will investigate options for the funding of test projects.'

More copyright commitments can be found in the Arts Policy, *Arts for All*. This policy restates some of the policies mentioned above before moving to new(-ish) territory. First cab off the rank is a renewed commitment to look at the issue of Film Directors' Copyright. This is because directors are not considered to be 'authors' of the films they direct in the same way that writers are 'authors' of literary works.

Secondly, the Coalition says it 'will work with the performing arts community to develop workable performers' rights legislation, which recognises

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the value attached to the recording and communicating of performances.' Performers rights legislation is something which has been on the table for several years now. It can be expected that legislation will be enacted in this term.

The Arts Policy also renews the commitment to indigenous rights. Ideas for indigenous IP have been proposed for several years now. In this latest policy, the proposal is now for a special indigenous moral rights regime, rather than a whole new IP regime as has been suggested in the past. An indigenous IP policy based on the newly minted moral rights regime seems a good place to begin.

And finally, the Coalition stated its intention to extend the duration of copyright in photographs to be consistent with other artistic works (life of the author plus 50 years, up from the current 50 years from publication). The Government has already consulted on this issue.

Nothing in the Coalition's copyright policies is of great concern to libraries but then again, there is nothing that is especially useful either. There is also the possibility that the review of the Copyright Act in light of new technologies will also see renewed rightsholder opposition to the library provisions. ▪

### **Licensing or Copyright Law? A Battle for Control of the Library 'Shelf', continued from page 3**

In order to clarify this situation, the Government asked the Copyright Law Review Committee to look at this matter.

(The CLRC is an independent Government advisory body given references on pertinent copyright issues from time to time.)

The CLRC website can be found at [www.clrc.gov.au](http://www.clrc.gov.au). In June 2001, the CLRC published an issues paper, seeking submissions from interested parties on this subject. It received 30 odd submissions, with a particularly good turn-out from the library sector.

The submissions, along with the Issues Paper, can be found here:

[http://www.clrc.gov.au/clrc/pres\\_ref/what\\_Committee\\_doing.htm](http://www.clrc.gov.au/clrc/pres_ref/what_Committee_doing.htm)

In general, as the Chair of the CLRC later observed, the 'copyright user' submissions were long and contained full explanations of the dangers of the new licensing environment; whereas the 'copyright owner' interests tended to be more brief and, for the most part, asserted that there was no problem to be remedied.

For example, the Australian Publishers Association, in its submission at page 2, said:

"The APA approached all of its members seeking information on whether any of them adopted such contractual terms and there were no positive responses. We then looked at the Internet sites of a number of on-line e-book sellers and did not find any express terms seeking to exclude or modify exceptions to infringement."

"From our enquiries, there does not seem to be reliance on such contracts in the book publishing industry. There does not appear to be any evil to be overcome by legislation at present."

(This is an interesting assertion given that the Australian e-book site [www.ebooks.com](http://www.ebooks.com) has the following as part of its terms and conditions: 'I further acknowledge that these limitations override (to the extent permitted by law) any right that I might have to use the Items under the copyright legislation in the country of use.')

Happily, the Australian library community was able to supply numerous examples of restrictive licence agreements. The result was that the CLRC is apparently convinced that such licence agreements are common and may be problem that requires action.

The question then becomes what to do about it. The ALCC, along with other user interests, has proposed that any clauses that purport to override copyright exceptions should be unenforceable.

Meanwhile the CLRC has foreshadowed that it may examine the public policy basis behind the various exceptions, with the result that some 'important' exceptions may be protected from contractual exclusions while others may not.

The CLRC is scheduled to hand down its report in the second quarter of next year. Its findings may well have an impact on library practice for decades to come. ▪

## Disclaimer

The Copyright Bulletin is intended as a general guide to librarians on current copyright issues.

It is not a substitute for legal advice and should not be relied on as such. If you need further advice on copyright issues, please contact the ALIA copyright officer on (02) 6285 1877 (e-mail contact: [copyright@alia.org.au](mailto:copyright@alia.org.au)) or speak to a solicitor.

## Copyright Humour

*In the tradition of funny back pages comes this attempt at a copyright humour segment.*

*Hopefully, it will demonstrate that despite the difficult, serious and sometimes absurd nature of copyright, there is never-the-less a funny side to intellectual property. (Or perhaps because of the difficult, serious and sometimes absurd nature of copyright...).*

*If you've seen the lighter side of copyright and have something to add, please drop me a line. (I suspect that this may be one of the more difficult columns to find material for in the history of Australian publishing.)*

## You Ain't Nuthin' But a Copycat...

From the United States Copyright Office (a branch of the Library of Congress). Copyright Frequently Asked Questions, #58.  
[<http://www.loc.gov/copyright/faq.html>]

### “58. How do I protect my sighting of Elvis?”

Copyright law does not protect sightings. However, copyright law will protect your photo (or other depiction) of your sighting of Elvis. Just send it to us with a form VA application and the \$30 filing fee. No one can lawfully use your photo of your sighting, although someone else may file his own photo of his sighting. Copyright law protects the original photograph, not the subject of the photograph.”

Seeing as this is the US Copyright Office's Frequently Asked Questions page, you would have to assume that they are asked this question...frequently. ■

## About the *Copyright Bulletin* and the ALCC

The *Copyright Bulletin* was produced by Nick Smith, Copyright Advisor to the Australian Copyright Committee. The *Copyright Bulletin* is released periodically, as the need arises, but will appear approximately twice a year.

It is distributed with the National Library's bi-monthly publication *Gateways*.

Subscriptions to *Gateways* (and thus the *Copyright Bulletin*) are available free on application to:

The Editor, NLA Gateways  
Network Services Marketing  
National Library of Australia  
Canberra ACT 2600  
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The *Copyright Bulletin* is also available on the ALCC website at [www.digital.org.au/alcc/](http://www.digital.org.au/alcc/) It may be freely distributed provided that it is not altered.

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## The Australian Libraries Copyright Committee

The ALCC's members are:

- the National Library of Australia;
- the Australian Library and Information Association;
- The Federal Libraries Information Network;
- the Council of Australian State Libraries;
- the Council of the Australian University Libraries; and
- the Australian Council of Archives.

The ALCC has a mailing list which discusses copyright issues of concern to librarians. You can subscribe by sending:

*subscribe copy-lib [Your Name]*

in the body of an email to [listproc@nla.gov.au](mailto:listproc@nla.gov.au)