Copyright Bulletin

Issue 17 October 2000

Return of the *Copyright Bulletin*

After a hiatus of two years, the *Copyright Bulletin* is back. The last issue was published in October 1998, a special issue, not dignified with a number, about the Copyright Law Review Committee's *Report on the Simplification of the Copyright Act (Part One – Exceptions to the Exclusive Rights of Copyright Owners).*

Two years later, the Government is yet to respond to that report, or its sibling, the slickly-titled *Part 2 – Categorisation of Subject Matter and Exclusive Rights and Other Issues*.

But some things have changed, the source of this *Bulletin* for one. Previously the *Bulletin* was put out by the Copyright Research Officer employed by the Australian Council of Libraries and Information Services. ACLIS is no more but the engagement of Australian libraries with thorny intellectual property issues continues to evolve…

Responsibility for copyright matters has been divided between the Australian Library and Information Assocaition (ALIA) and the Australian Libraries Copyright Committee.

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Welcome to your Digital Copyright Future

The Copyright Amendment (Digital Agenda) Act 2000 amends the *Copyright Act 1968* to take account of developments in the communications environment such as the Internet. The Act, which was passed on 17 August 2000 will come into effect on 4 March 2001. Both the Government and the ALP have committed themselves to reviewing the Act in a few years.

The Act had bi-partisan support in Parliament with all groups convinced of the need for a balance to be struck between creating an appropriate incentive for copyright owners and allowing reasonable access for copyright users. In particular, a number of parliamentarians spoke of the importance of libraries.

Despite this, and despite the fact that the Act could have been a lot worse, it is not without significant problems for libraries and their users (which, let's face it, is everybody). For an outline of digital copyright problems, see Page 7.

If you or your library's patrons encounter problems with the Act (or problems with digital copyright generally), please document them and send them to me (contact details on the back page).

Negotiating your way through the Digital Agenda Act will be a difficult process. Inside this *Bulletin* at page 2 is a guide for libraries in complying with the Digital Agenda Act. Please note that clear answers cannot always be given; sometimes I have had to resort to that traditional lawyer's standby 'it depends'…

Of course, we couldn't talk about digital copyright issues without mentioning Napster. Never have copyright matters been in the news so much. This issue features a rundown of some the issues raised by Napster (starting with what Napster is) at page 5.

There is also a report on copyright matters at the International Federation of Library Associations and Insitutions annual conference in Jerusalem at page 6.

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Australian Libraries Copyright Committee

The Digital Agenda Act: A Compliance Guide for Australian Libraries

This is intended as a guide to librarians in complying with the *Copyright Amendment (Digital Agenda) Act 2000* which comes into force on 4 March 2001. It is not a substitute for legal advice.

Because the legislation itself is new and is dealing with emerging technologies, advice is sought from librarians and library policy making bodies on how libraries might best comply with the new laws.

For these reasons, certain answers cannot always be provided to legal questions. Eventually the material below will be incorporated into ALIA's copyright FAQs.

DA Act compliance issues can also be discussed on the copy-lib mailing list (see back page).

Copyright v Contract Law

The DA Act leaves unresolved the question of copyright law versus contract law. The fact that some exceptions (ie, the computer software 'decompilation' exceptions) may not be 'contracted out' of, tends to imply that all other exceptions *may* be contracted out of. On the other hand, the fact that the Act permits dealing in 'circumvention devices' in order to get around technological protection measures (such as software locks) in pursuit of a small set of 'privileged' exceptions (ss. 47D, 47E, 47F, 48A, 49, 50, 51A, 183 or Part VB) tends to suggest that, for these exceptions at least, access may not be inhibited by technology or contract.

In any case, it would be prudent for libraries to abide by licence agreements in so far as this is possible.

It is possible that this confusion over contracts v copyright will eventually be resolved, either through (i) a legislative amendment; (ii) a test case or (iii) a standardisation of licence agreements to reflect copyright law, but this cannot be relied upon.

Changes / concerns:

- Are licence agreements properly understood and easily accessed by libraries?
- Are there any terms in licence agreements which are manifestly unreasonable? For example, if a library acquires a book with a CD-ROM in the inside cover and this CD-ROM comes with a license agreement that prohibits lending, what should that library do?

Library Authorisation Liability (ss. 39A and 104A)

These provisions extend the current exemption from authorisation liability relating to infringing copies made by patrons on photocopiers to cover (a) copies made on machines other than photocopiers and (b) audio-visual material.

Changes / concerns:

- Libraries should put copyright notices on other types of machines, typically computers (which many libraries already do).
- The actual copyright notice (for all types of machine including photocopiers) will change. As part of the reflection of the 'right of first digitisation', copyright notices must reflect, amongst other things, the new penalties for analogue-to-digital infringement. Libraries will be advised as soon as the new copyright notice is available.

Document supply (ss. 49 and 50)

These provisions permit supply of both digitised print source material and electronic source material. The current law remains with respect to the supply of print source materials. Electronic source materials are treated slightly differently and s. 50 (library-to-library supply) has different requirements to s. 49 (library to user supply).

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Rebirth of the *Copyright Bulletin*

ALIA is responsible for advice to libraries and librarians on copyright and inter-library loans. The ALCC, which is a cross-sectoral committee representing many Australian libraries, is responsible for lobbying the Government on copyright policy. It shares this role with the Australian Digital Alliance.

The ADA, which includes a number of libraries as members is a non-profit coalition of groups and individuals committed to putting a public-interest perspective in the copyright debate.

The ADA's website is at: www.digital.org.au and the ALCC's is at: www.digital.org.au/alcc/ .

ALIA's website is at www.alia.org.au/copyright/

Changes / concerns:

- Both s. 49 and s. 50 permit the scanning of print material and the electronic communication of the resulting digital reproduction; as soon as practicable after the communication, the interim digital copy must be destroyed (ie, the scanned copy held by the supplying library). Libraries should have a procedure in place which ensures that such copies are destroyed as a matter of course.
- (For s. 50 only) no portion of electronic source material may be communicated if that material is commercially available. Note that for material to be 'commercially available', the 10% portion or chapter or article must be available for separate sale. It is not sufficient that an article may be commercially available as part of a larger aggregated service.

- If an article, being a 'reasonable portion', is to be supplied without the application of the CA test (under ss 49 and 50, print and s. 49, electronic), it must be an article in a 'periodical publication'. If articles are occasionally added to a website but are not part of a 'periodical' as it is normally understood (ie something published on a regular basis), it may not be an article for the purposes of these provisions. For example, articles which are added to 'pre-print servers' such as http://arXiv.org/ 'would probably not be 'articles' for the purpose of ss. 49 and 50. If you are not sure and the material is not licensed so that you can use it, it is probably better not to communicate this material.
- Under new regulations which are still to be worked out, a notice will need to accompany s. 49 communications (ie, material sent from a library to a user). Libraries will be advised as soon as the details of this notice are available.
- A 10% (reasonable) portion of electronic material is now to be measured in words rather than pages. Are libraries equipped to make such a measurement?

Intra-Library Networking of Digital Resources (s. 49 5A)

This provision enables electronic material acquired in digital form to be networked across the physical premises of the Library, provided that electronic reproductions and communications cannot be made.

Changes / concerns:

- If this provision is to be used (assuming that networking of digital resources is not governed by contract), are the 'premises' of a library (ie, its boundaries) clear? For most libraries, this will be obvious but it may not be as clear for multi-campus university libraries, for example.
- What hardware / software modifications will need to be made?

Copying and Communication of Unpublished Works (s. 51)

Section 51 has been amended to remove the 75 year restriction on use of unpublished works held in the collection of a library (only the requirement that 50 years must have elapsed since the death of the author remains).

This provision allows potentially quite broad use of unpublished material which satisfies the requirements. A library may communicate a reproduction of the whole work to a person for research or study or with a view to publication provided it is not to be used for another purpose.

Changes / concerns

- Is this provision currently used?
- Its potential broadness means it could be potentially very useful; do libraries anticipate using this provision?

Preservation (s. 51A)

Allows digital preservation copies to be made of original works in a library's collection or published works held by a library that have been lost, stolen or have deteriorated. Such reproduction may be communicated within the library but not made available to the public except reproductions of artistic works that have deteriorated or are unstable so that they cannot be displayed.

It also allows the communication of reproductions of 'manuscripts or original artistic works' for the purpose of research being carried out at another library or archives.

Changes/concerns:

- How will libraries interpret the provision allowing the public display of artistic works? Theoretically, all physical works have deteriorated since their digital image was captured. What level of deterioration is necessary before their display will be justified?
- (similar to s. 51 above) Do / will libraries use s.51A to copy and communicate the original versions of works for the purpose of research being carried out at another library or archives?

Circumvention Devices

The DA Act imposes civil and criminal penalties on those who manufacture, import or deal in 'circumvention devices' (devices to get around technological protections such as software locks). However, libraries will be able to acquire such devices to circumvent technological protection measures in support of ss. 49, 50, 48A, 51A (among others).

Changes/concerns:

- Under what circumstances would libraries consider acquiring/using such a device?
- How does this relate to the question of copyright versus contract law? For example what if a contract forbids an act of circumvention which the law otherwise allows?

Rights Management Information (RMI)

The DA Act imposes civil and criminal penalties on those who strip RMI (such as the name of the author or the terms under which the material may be used) or who distribute copyright material where the RMI has been removed.

Changes/concerns:

- Do any library practices unintentionally remove RMI from copyright materials?
- Libraries will need to examine their procedures (as well as any outsourced processing of library materials) to ensure there is not removal of RMI. There is a further concern as to liability of the library if RMI is removed by a patron. What steps can be taken to ensure that RMI is maintained on loan items?

For more information on the *Copyright Amendment (Digital Agenda) Act* 2000...

There is a lot of information on the Internet. Here are a few links for those who are hungry for more. (Needless to say, some of these URLs will be out of date by the time this goes to print. That's the Internet for you…)

The final text of the Act:

http://www.digital.org.au/issue/dafinal.rtf

(Unfortunately, at the time of writing there is no amended version of the *Copyright Act 1968*.)

What the Australian Digital Alliance has to say on the Act:

http://www.digital.org.au/issue/dabill.htm

The Attorney-General's Department's Copyright E-newsletter:

http://www.law.gov.au/publications/copyright_enews/issue16.html

Australian Copyright Council Information:

http://www.copyright.org.au/PDF/InfoSheets/G065v01.pdf

Napster and the Future of Copyright

Napster: how can one meaningless word (actually the nickname of its inventor Sean Fanning) generate so many other words in response? Napster, which Fanning invented when he was just 19, is a way to share music files (in the MP3 file format). Users register with Napster and download the software which enables them to join the ‘Napster community’. Once a member, music files on the user’s hard drive become available to all other members whose own music files in turn become available to the new user. (This sort of file exchange has become known as ‘peer-to-peer’ computing).

You can either listen to the files directly or make a copy onto your own hard drive. As Napster says about itself: ‘the MP3 files that you locate using Napster are not stored on Napster's servers. Napster does not, and cannot, control what content is available to you using the Napster browser. Napster users decide what content to make available to others using the Napster browser, and what content to download. Users are responsible for complying with all applicable federal and state laws applicable to such content, including copyright laws.’

‘Napster…has muddied the copyright waters (though at least it has opened the subject up for more debate). Many types of copyright usage are inappropriately compared to Napster. Most digital dissemination is not at all like Napster

‘Napster respects copyright law and expects our users to do the same. Unauthorized copying, distribution, modification, public display, or public performance of copyrighted works is an infringement of the copyright holders' rights.’

In reality, the vast bulk of what is ‘shared’ using Napster is copyright-protected music files. Napster probably facilitates a great deal of infringement of copyright. Many users build up music libraries copied via Napster from other people’s hard drives.

Unsurprisingly, Napster has been sued by record companies in the US. The Record Industry Association of America (RIAA) won an interim injunction against Napster which would have shut it down until the case was heard but this was overturned on appeal. The case proper commences shortly.

Many groups have come out in support of Napster, not because they necessarily believe that its music service is appropriate, but because they object to what the law suit might do to a brand new technology.

Napster is often compared to the VCR. Hollywood film studios attempted to cut off new VCR technology at birth in the late 70's/early 80's. It was claimed that video tapes would destroy the film industry. ‘The VCR is to the American film producer and the American public as the Boston Strangler is to the woman alone,’ said Jack Valenti, president of the Motion Picture Association of America, in 1980.

Of course, Valenti could not have been more wrong. The video rental industry now contributes as much to the studios’ bottomline as cinema exhibition does. (Interestingly, Valenti is still active today combatting new technologies in the name of copyright).

If the RIAA is successful, it is feared that a truly useful technology will be destroyed before it has a chance to properly prove its worth as something which benefits copyright owners and users alike.

One of the downsides of the recent Napster controversy is that it has muddied the copyright waters (though at least it has opened the subject up for more debate). Many types of copyright usage are inappropriately compared to Napster. Most digital dissemination is not at all like Napster. A great deal of material is made available over the Internet by the author for free (this pretty well sums up the World Wide Web). Other material is disseminated (although not on the Web) with the full permission of the law by libraries and universities (by contrast, Napster operates in a legal grey area).

For example, an article in *Salon* called 'The Napster Library' compared the recent efforts of the San Francisco Public Library to allow the electronic loan of library material with Napster. A closer reading revealed that: ‘most of the books offered through NetLibrary are from the public domain archives of Project Gutenberg or academic publishers.’ This means that material being loaned (copies of books disappear off your hard drive when they’re due) is either out of copyright or licensed by a publisher. There's no legal question mark here.

It's important not to confuse this kind of inventive and perfectly legal use of new technology by libraries and other bodies with Napster.

International Federation of Library Associations and Institutions' Annual Conference: the Copyright Angle

During the August 2000 conference of the International Federation of Library Associations and Institutions (IFLA) in Jerusalem, the international library sector considered intellectual property and other legal issues through its Committee on Copyright and Other Legal Matters (CLM). It also put the finishing touches on the *IFLA Position on Copyright in the Digital Environment*. The Position was approved and formally adopted by IFLA's Executive Board. This document, which emphasizes the need for a balanced copyright regime that promotes the advancement of society as a whole, can be found at www.ifla.org/V/press/copydig.htm.

The CLM continued its work on a set of licensing principles to assist libraries in developing contractual relationships with digital publishers. It is anticipated that these principles will help libraries negotiate the complex and overlapping terrain of contracts and copyright. Final adjustments were made to this list of 26 key points during the CLM business meetings in Jerusalem, and it is hoped that these principles will be approved by the Executive Board in December 2000.

In Jerusalem, the progress of a number of small CLM working groups was also reviewed. Groups of three or four committee members work together during the year on issues such as copyright, licensing, the World Trade Organization (WTO), privacy and the Florence Agreement. The Mergers working group which monitors the ever-increasing vertical and horizontal integration of content providers, amalgamated with the WTO group, allowing the CLM to better monitor the process of globalization.

CLM also organized a number of seminars and workshops to bring copyright and other legal issues to the wider library community. Canadian librarian Paul Whitney, gave an engaging account of his experience as an IFLA delegate at the WTO meeting in Seattle. The WTO is today the foremost international rule-setting body in terms of the depth and breadth of its influence. A central part of the WTO's work is the General Agreement on Trade in Services (GATS). Whitney spoke of the danger that library services might inadvertently be included in GATS. This could result in libraries being viewed as government-subsidized competitors with commercial 'information providers' rather than as a vital public service.

In a CLM guest lecture, potential problems with international trade regulation were also raised by Canadian lawyer and trade activist, Steven Shrybman. Shrybman discussed the dispute over Canadian split-run magazines (U.S. magazines repackaged as Canadian with minimal local content which can undercut genuinely Canadian publications for the sale of advertising space). A WTO dispute panel recently ruled that measures by the Canadian government to protect local publishing violated international trade rules. Shrybman asked his audience to consider the wider implications, especially for libraries, of cultural matters being considered as purely trade issues.

There was also a useful CLM-organized session on the public lending right with discussion of four very different public lending right systems. Held jointly with Freedom on Access to Information and Freedom of Expression (FAIFE), another seminar at the Conference addressed 'challenges to equitable and universal access', in particular the challenges of censorship, copyright and technology. Other issues discussed in Jerusalem under the CLM banner included copyright in Central and Eastern Europe and the future of copyright management in universities.

(Nick Smith, Copyright Advisor to the Australian Libraries Copyright Committee is a member of CLM. An abridged version of the paper he delivered at the CLM forum on challenges to freedom of access to information can be found in the October 2000 issue of *InCite*.)

Storm Clouds Ahead: Problems with Digital Copyright

Libraries did fairly well out of the *Copyright Amendment (Digital Agenda) Act 2000*. That is to say, we could have done a whole lot worse. But it's far from ideal. Below are several problems that flow from the Digital Agenda Act or are otherwise on the horizon.

Definition of 'Library'

An earlier version of the Digital Agenda Act contained a provision that would have excluded corporate libraries from the definition of 'library' in the Copyright Act, effectively taking them out of the ILL system and rendering them unable to function like other Australian libraries.

This was defeated but the idea has not gone away and may be revisited by the Government.

Contracts vs Copyright Law

As mentioned above in the Digital Agenda library compliance guide, the Act tends to imply that it is perfectly legal for contracts to override what the copyright law provides. This is not what the Government intended but is a consequence of how the Act has been drafted.

The issue of copyright versus contracts is only going to get bigger and bigger. Some have said that contract will eventually largely or even totally replace copyright. This is disturbing when you consider where intellectual property contract bargaining power lies, especially with respect to consumers.

The real shark lurking in the contract pool however is an American law called the Uniform Computer Information Transactions Act (UCITA). UCITA is a contract law statute that would apply to computer software, multimedia products, computer data and databases, online information, and other such products. It was designed to create a uniform commercial contract law for these products and calls itself 'a cyberspace commercial statute'. It covers contracts that are generally known as shrink-wrap or click-wrap licenses. It isn't here yet but it probably won't be long before copyright owners in Australia, particularly software publishers, are clamouring for it, insisting that it is vital that Australia has its own UCITA so that we can 'keep up' with the US.

Some things that UCITA would permit include :

- Validating post-payment disclosure of terms. That is, it allows a contract to be valid even though you only discovered some or all of the terms after you have pressed the 'I agree' button.
- Creating doubt about whether online transactions of this kind are covered by consumer law. Traditionally mass-market software transactions have been treated as sales of goods and subject to consumer protection law. This may not be the case any longer.
- Validating the use of transfer restrictions in the mass market that conflict with normal customer expectations. This means that you may be restricted in lending a lawfully acquired product to another person even though you yourself do not keep a copy.
- Allowing the sellers of any goods to take advantage of UCITA if software is also provided and is a 'material' part of the transaction. 'Material' is described in a comment as meaning anything more than a trivial element of the deal. Because many goods are sold with software inside them, from cars to cameras, UCITA may wind up governing all kinds of distinctly non-online transactions.
- Allowing vendors to prevent users and reviewers from publicly discussing a product. This has already happened. The website Slashdot.org contained postings about a Microsoft product security flaw. Microsoft demanded that Slashdot.org remove the postings, contending that when the users downloaded the product from the Microsoft site, they clicked on a confidentiality agreement. Therefore, users are unable to publicly comment on the software.

This is not just a computer software problem. The American Association of Research Libraries said that: 'the broad definition of "computer information" would cover everything from copyrighted expressions such as stories, computer programs, images, music and web pages to other intellectual property such as patents, trade secrets, and trademarks as well as online databases and interactive games.'

So far apparently only the state legislatures of Virginia and Maryland have passed this law, though others are considering it. Virginia Governor Jim Gilmore said. 'This increase in electronic transactions [brought about by UCITA] will perpetuate the Internet revolution, promote e-commerce and foster the growth of Virginia's technology and manufacturing economies.'

This kind of assumption that the information economy can be helped along by giving copyright owners greater rights at the expense of the public is not uncommon. Look for a UCITA clone at a legislature near you in the not too distant future.

Your (Non-existent) Right to Read

And finally, there is an issue that the Act partially addressed, that of temporary reproductions. The Act makes it clear that temporary reproductions, such as copies automatically made on your screen, in your hard drive or in your Random Access Memory (RAM), which are made as part of a communication are excepted from the copyright owners' right. An example of this might be viewing material on the web. The copyright owner can control the communication from the website but not all the automatic reproductions that come with it.

However, in the case of an e-book, for example, the temporary reproductions made while reading such a publication are not part of a communication and are therefore not covered by the exception. The result of this is that you could need a licence to *read* an e-book, a very disturbing precedent in terms of our society's level of access to knowledge.

This problem will be exacerbated as electronic material is increasingly released in proprietary formats. One of the great advantages of a book is that it is an open technology that no one controls. Copyright laws allows some control over the words you could put in a book but not who could or could not make a book or what could be done with a book once it had been purchased.

In your digital copyright future, not only will electronic book technology be licensed, so too will the contents of such books. It is already the case that we typically license software rather than own it (though we may own the piece of plastic it comes on). In the future, a consumer might purchase a license to have access to copyright material for two years or for as long as she keeps paying licence fees. Once the licence period is over, the consumer is left with nothing, the copyright material having disappeared from her hard drive.

So while the *Copyright Amendment (Digital Agenda) Act 2000* was generally a good outcome for libraries, there are still a number of issues coming up which require the close attention of librarians and other supporters of the public domain.

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) or speak to a solicitor.

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.

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The *Copyright Bulletin* is also available on the ALCC website at 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, ALIA, the Council of Australian State Libraries, the Council of the Australian University Libraries, 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