

NLA/385
10 August 2001

Ms Fiona Phillips
Director
Copyright Law Review Committee
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Ms Phillips

I am pleased to forward the National Library's submission to the Copyright Law Review Committee on the Copyright and Contract Issues Paper.

Consent is given to the Secretariat to make this submission—*excluding* Attachments A and B—available in digital form.

Yours sincerely

David Toll
Deputy Director-General

NATIONAL LIBRARY OF AUSTRALIA
SUBMISSION TO THE COPYRIGHT LAW REVIEW
COMMITTEE
ON THE COPYRIGHT AND CONTRACT ISSUES PAPER



Issue 1: The Committee seeks your views as to the extent that electronic trade in copyright material is subject to agreements that try to exclude or modify limitations to the exclusive rights of copyright owners provided in the Act. Can you provide the Committee with examples of any such agreements?

In December 2000 the National Library of Australia conducted an administrative audit of licence agreements for electronic titles available in its Reading Rooms (**Attachment A, in hard copy**). This survey of some 218 titles (a number of which are accessed from the same source) was undertaken with copyright law in mind revealed:

- 8 titles (3 %) where downloading was not permitted (*Yearbook Australia, Nineteenth century short title catalogue Series 3, 1871-1919*, and the genealogical *Pioneer Indexes*¹); one (*CLIB96* CD-ROM of the 1996 census) where readers were not permitted to remove downloaded data from the library; and 82 (37%, mostly the Informit range of databases) where downloading was limited to “one copy of search output”;
- 11 titles (5 %) that did not enable emailing of extracts; with some of these (the *Pioneer Indexes*), this is probably for technological reasons, but it is interesting to note here products such as the *New Grove dictionary of music and musicians* and *Yearbook Australia*;
- 6 titles where printing is not permitted, two which allow a “single copy only,” and three others where printing is permitted “for personal or internal use of the organisation” or “only 1% of database material” (*New Grove dictionary of music and musicians* again), total 11 (5 %);
- 26 titles (11 %) (principally newspapers received as part of the *Electric Library* subscription) where interlibrary loan was not permitted; and
- 7 titles (3 %) where reference staff were not permitted to use short extracts in answering email enquiries.

One of the objectives of the *Copyright Amendment (Digital Agenda) Act 2000* was to extend the concept of fair dealing to the electronic environment. This should mean that readers are subject to broadly the same legal restrictions in their use of electronic as of print material. From the National Library’s survey (which should be regarded as indicative rather than authoritative, because of its administrative nature), it appears that restrictions of some sort which *might* be interpreted as limiting “fair dealing” use were imposed by contracts for 116 products altogether (53 % of the products surveyed), including material published in Australia and overseas. Such restrictions allow copyright owners greater control over their works than is envisaged by the *Copyright Act*, and prevent readers from legitimately downloading, printing or emailing material for the purposes of research or study under the fair dealing provisions of the Act.

¹ The *Pioneer Indexes* were however the only ones to explicitly mention that they should be used according to the *Copyright Act* 1968.

The concern of copyright owners to protect their rights is understandable, given that technology now makes it easier for people to infringe those rights. The National Library is concerned, however, that in attempting to protect their rights, copyright owners are using licence agreements to contractually limit legitimate fair dealing rights of the public, rights that have been granted by statute in order to promote the free flow of ideas and the advance of knowledge. On top of that, many publishers are using technological means to enforce these contracts.

A particularly salient example of a situation where library users are subject to greater restrictions in the electronic environment than in the print world is that of Standards Australia, which charges commercial organisations a fee of \$15,015 p.a. for online access to the full set of standards publications. Staff of subscribing organisations are able to download or print Standards. Libraries are similarly charged \$15,015 p.a., but the licence agreement (**Attachment B, in hard copy**) prescribes that use of “the Software” is available “for their own internal purposes only”: readers are effectively prevented from making any fair dealing use—by printing or downloading—of the Standards subscribed to—use that they *could* make (by means of photocopies) when paper subscriptions were held by libraries.

It is the National Library’s view that the prevalence of licence agreements is leading to increasing restrictions on the use of copyright electronic material.

Issue 2: The Committee seeks your views as to whether the situation is any different in relation to trade in copyright material that occurs offline. Can you provide the Committee with examples of any such agreements?

Taking the term ‘offline’ to refer to print material, the Library points out that simple *use* (i.e. reading or viewing) of print material is outside the scope of the *Copyright Act*, whereas *any* use of electronic material is subject to the terms of a licence agreement. *Copying* of print material *is* covered by the *Copyright Act*, whereas copying of electronic material is again subject to the terms of a licence agreement—an agreement that may well impose conditions contrary to the concept of fair dealing in the *Copyright Act*.

The Library has signed no agreements governing the *use* of print material by readers, and therefore the vast majority of use by them, and more especially their *copying* from the Library’s print collections, is governed solely by the terms of the *Copyright Act*.

Issue 3: The Committee seeks your views as to the nature of any such difference.

Copyright is at the best of times a complex area, but one in which most library users are aware of the basic principles, such as their right to copy limited amounts of copyright material. The overlay of licence agreements governing use and copying of electronic copyright material brings unnecessary additional complexity to this area, not only for users but also for administrators. More importantly, it means that the control of information in our democratic society is increasingly subject to contracts set by multinational companies rather than to the statutory standards set by the Parliament.

It is highly desirable that use of electronic resources be subject to the same standards as print resources, and that copyright law rather than a myriad of contracts should provide a standard framework for the use and copying of both print and electronic resources. Readers and administrators would then know where they stand in regard to intellectual property rights, and the complexity of managing multiple resources with multiple conditions would be considerably lessened.

Issue 5: The Committee seeks your views about whether:

(a) there are legal remedies other than those outlined above to protect against the use of agreements to override copyright exceptions granted under the Act; and

The National Library is not aware of any other legal remedies other than those outlined in the CLRC Issues Paper.

(b) the existing legal remedies provide adequate protection against the use of agreements to override copyright exceptions granted under the Act.

In our view, the current uncertainty as to whether copyright law exceptions apply in cases where a licence agreement has been signed shows that existing legal remedies are inadequate or non-existent. Fear of being the object of a test case is inhibiting legitimate fair dealing in copyright material where licence agreements impose conditions that override copyright exceptions.

Issue 7: The Committee seeks your views on whether jurisdictional issues are likely to result in copyright exceptions being overridden and, if so, on suggested solutions.

The National Library believes that all copyright matters within Australia should be governed by Australian law. The obligation to adapt licence agreements to the Australian legal environment should fall to vendors in these situations, since they are in a position of power in relation to their customers, and in a better position to reinterpret their licences for Australian jurisdictions.

It is worth investigating the possibility of providing that where standard licence agreements offered by vendors provide that the agreement shall be governed by the law of a foreign jurisdiction, this shall be read as providing that the agreement is made under Australian law. If this does not occur, the free flow of information within Australia will become increasingly subject to contracts set by overseas companies and subject to foreign law, to the detriment of our democracy and our information economy.

Issue 9: The Committee seeks your recommendations as to any specific action, legislative or otherwise, in relation to the issues raised in your submission.

The protection of intellectual property has been the sphere of copyright law for over three centuries, and during that period copyright has succeeded in providing a reasonable balance between the rights of copyright creators and society. The National Library recommends that steps be taken to ensure that this continues to be the case in the future, and specifically that the following objectives be sought:

- the uncertainty as to the primacy of copyright or contract law should be resolved in favour of copyright law
- model licences should be officially promoted in order to achieve the same uniformity in access to electronic material as exists in relation to print material
- Australian jurisdiction over intellectual property transactions within Australia should be established.

As an example, the National Library's "Deed for the Use of CD-ROMs & Other Electronic Materials Received by Voluntary Deposit"² provides a model for access to electronic products that we see as a good basis for development of a standard Australian licence agreement, either by legislative means or through development of a cooperative policy framework. This section relates to the use of products:

4. Where the purpose of the User is

- (a) research or study; and
- (b) not commercial

use of the Products by means of downloading reasonable portions of the information contained in any of the Products (which does not include Software, provided subclause 7 is not breached) or derivatives thereof into

- (c) printed form; or
- (d) an electronic, magnetic, optical or similar form of storage is permitted.

For the purpose of this clause "reasonable portion" shall have the same meaning as it has in Section 10 (a) of the *Copyright Act, 1968*.

The Council of Australian State libraries, through its CASL Consortium, has developed a *Statement of Principles Guiding Licence Negotiation* (Attachment C), which we commend to the CLRC as a guide for developing a potential model licence agreement for Australian jurisdictions.

² <http://www.nla.gov.au/policy/deed.html>

Attachment C: CASL Consortium: Statement of Principles Guiding Licence Negotiation

<p>1. Definition of Users</p>	<p>1.1 <i>In order to achieve its ultimate vision of providing access to all Australian residents to a core set of electronic resources, the Consortium aims to negotiate the broadest possible definition of 'User' consistent with a fair commercial return to Vendors. It is necessary to differentiate between 'all users' and 'all uses'. While access for all Australian residents is required, the purposes for which the information can be used may be limited, providing the purposes are consistent with paragraph 2.1.</i> [Vendors please note: In the first 12 months of operation of the CASL Consortium (from Feb 2001), access is sought for walk-in users of the State, Territory and National Libraries only.]</p>
	<p>1.2 As a minimum, the Members require</p> <ul style="list-style-type: none"> • access to Products for individual 'walk-in' Users of Members • remote access for registered Users of Members <p>[Vendors please note: As stated above, access is sought for walk-in users of the State, Territory and National Libraries only for the 12 months from Feb. 2001. The Consortium may seek to negotiate extended access, for instance, to remote users or public libraries after that period.]</p>
	<p>1.3 The Members do not seek access for other organisations, eg, educational institutions and business, except Public Libraries on whose behalf they are acting. [Vendors please note: Access is not sought for public libraries during the initial 12-month period.]</p>
<p>2. Required rights for access and use</p>	<p>2.1 Any Licence entered into by the Members must recognise and should not restrict or abrogate the rights of the Members or their User community permitted under Australian copyright law.</p>
	<p>2.2 In particular, Licences should permit use at a minimum as allowed under Australian copyright law, including downloading and printing for permitted purposes and unlimited viewing.</p>
	<p>2.3 The Licence should state clearly what access rights are being acquired by the Consortium.</p> <ul style="list-style-type: none"> • during the term of the Licence • once the Licence expires or is terminated (ie, perpetual access is sought)
	<p>2.4 As stated under clause 4.1, the Consortium requires perpetual access to electronic information to which it subscribes.</p>
	<p>2.5 Perpetual access must be transferable should the Consortium wish to change Vendors</p>
	<p>2.6 The Licence should include provision for compulsory transfer (novation or assignment) by the Vendor to any entity that takes over the business of the Vendor.</p>

	2.7 Licences should permit the transmission of copies of parts of electronic publications for the purpose of non-commercial document supply between a Member and a requesting library that is not a member of the Consortium. A part may be an article contained in a periodical publication or a reasonable portion of a work. Permitted methods for transmission should include electronic transmission, for example, Ariel.
3. Authentication	3.1 Vendors should be flexible as to the mechanisms of authentication or validation of Users to suit the needs of Members.
4. Archiving/preservation	4.1 The Consortium requires perpetual access to electronic information to which it has subscribed. A Licence should specify who has permanent archival responsibility for the Product and under what conditions the Consortium may access or refer Users to the archival copy.
5. Ongoing support/training	5.1 Licences should specify the Product training packages and customer support services that will be provided. (The presence or absence of user friendly and effective help modules within a Product will be an important factor in determining selection of a Product.)
6. Service levels	6.1 The Licence should specify the Product performance and service levels the Consortium can expect from the Vendor and the Product, including technical interface and operation requirements. (Note: performance and service levels are likely to be Product specific.)
7. Monitoring/user statistics	7.1 Licences must guarantee the Consortium as a whole, as well as individual Members, the right and opportunity to measure use and to gather and exchange the relevant management information needed for collection development and Consortium purposes.
	7.2 A Vendor should be willing to generate for the Consortium as a whole and for every participating Member (including Public Libraries whose interests are being represented by a Member or who are Members) <ul style="list-style-type: none"> • composite data about the use of the Product; • itemised statistics about information accessed, for instance, usage at both the journal title and article level; • use from the library site of each Member; • remote use. Alternatively, the Product must contain an administrative function enabling Members to generate easily their own statistics.
	7.3 The routine collection of data by either party to a Licence should be predicated upon disclosure of such collection activities to the other party and to other Members and must respect and comply with laws and institutional policies regarding confidentiality and privacy.
	7.4 The Members must be allowed to share management information about the Vendor's Product and its usage.
	7.5 Licences must not place liability on the Members for the misuse of content or the Product by the User. However, the Consortium will make reasonable efforts to prevent misuse or abuse by Users and will cooperate with Vendors to stop it should it occur.

8. Privacy	8.1 Licences should ensure that privacy of individuals using the Product is protected. The Vendor must not collect or record information about individuals using the Product, share any information about individuals with a third party, or use such information for marketing purposes.
9. Administrative arrangements	9.1 All terms and conditions should be negotiated and clearly stated in the Licence, including: <ul style="list-style-type: none"> • details on to whom the Licence is to be granted to, ie, Members, including any Public Libraries on whose behalf a State/Territory library is acting. • the number of simultaneous Users permitted; • fixed price Fees including any applicable GST; • the pro rata rate for libraries joining the Consortium later in the subscription year or otherwise during the term of a Licence.
	9.2 A Licence should not require the Consortium to adhere to unspecified terms in a separate agreement between the Vendor and a third party unless the terms are fully reiterated in the Licence between the Vendor and Members and are acceptable to the Consortium.
	9.3 The Licence should provide that any changes to the Licence are subject to prior agreement by both parties.
	9.4 A Licence should provide termination rights that are appropriate to each party.
	9.5 Non-disclosure language should not preclude the Members from sharing pricing and other significant terms and conditions with other consortia.
	9.6 A Licence should require the Vendor to defend, indemnify, and hold the Members harmless from any action based on a claim that use of the Product in accordance with the Licence infringes any patent, copyright trade-mark, or trade secret of any third party. The Licence should include a procedure for dealing with infringements.
	9.7 The Licence should include a warranty that the Vendor has the right to grant the Licence and that the Members' use of the resources contained in the Product will not infringe the Intellectual Property rights of any person.
	9.8 The Licence should specify how and when updates to the Product will be provided and any fees associated with updates.
	9.9 The governing law under which the Licence is made should be the law of the Australian Capital Territory or another Australian State or Territory.

Online version: <http://www.caslconsortium.org/licenceprinciples.html>