



1 August 2001

The Director,
Copyright Law Review Committee Secretariat,
Attorney-General's Department,
Robert Garran Offices,
Barton. ACT. 2600.

Dear Sir,

I submit the attached in response to the Committee's invitation to comment on the matters raised in the Committee's terms of reference regarding the prevalence, effects and desirability of contracts that purport to override copyright exceptions granted under the Copyright Act 1968.

As requested by the Committee, a printed copy of this submission follows by post.

I give my consent to the Secretariat to make this submission available in digital form and place no limitations on the subsequent use of the material in that form.

Yours faithfully,

Hans W. Groenewegen,
Deputy University Librarian.

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**Submission by Hans W. Groenewegen
to the Copyright Law Review Committee
regarding the prevalence, effects and desirability of contracts that purport to
override copyright exceptions granted under the Copyright Act 1968.**

I am making this submission in my capacity as Deputy University Librarian of Monash University. In that capacity I have responsibility for reviewing all license agreements relating to subscriptions to digital information resources that are acquired by the University Library. I initiate negotiations with vendors regarding unsatisfactory license conditions and have been sub-delegated by the University to sign license agreements relating to computer software on the University's behalf. I also have responsibility within the University for all matters relating to the administration of the Part VB Remuneration (Sampling) Agreement between CAL and AVCC, to which Monash University is a party.

My comments on the Issues in the Committee's Issues Paper are as follows:

Issues 1, 2 and 3.

Electronic materials acquired by libraries. Libraries are major participants in trading copyright materials. Increasingly over the past ten years, these copyright materials are in electronic form. They can be categorised in three major categories:

1. Indexing and abstracting services – these contain citations to and/or abstracts of journal articles and in some cases monographs, but they do not contain the full text.
2. Electronic versions of the full text of serial titles, generally scholarly in orientation. The various titles are frequently offered as parts of aggregated collections.
3. Electronic versions of full text of monographs. Until recently these have been mostly dictionaries, encyclopedias and other types of ready reference books. Lately there has been an upsurge in the number and range of textbooks and recreational titles that are marketed in electronic form. These are generally known as e-books and are often designed for reading on specialised portable readers.

In the majority of cases access to these electronic publications is sold on a subscription basis and is subject to license agreements. However most of these agreements are negotiated off-line and it is still uncommon to encounter mass market licenses in this environment.

How restrictive are the current licenses ? Some time ago I had occasion to quickly review all the licenses for electronic resources that Monash has signed from the start of 1997 onwards. Most of these were for abstracting and indexing services and subscriptions to electronic journals. I could find no examples of licenses specifically overriding exceptions. I don't think that the situation has changed greatly since then. Indeed, thanks to the lobbying of librarians and library consortia, most licenses have steadily become more liberal and appropriate to our requirements. As Clifford Lynch

has pointed out ¹, this is largely due to the fact that libraries represent a significant part of the market for these types of resources. But, as he goes on to say, it may not be so easy to negotiate such licenses for e-books that are targeted for consumer markets, of which libraries are only a small component. I will return to this point later.

One fundamental problem with licenses. Although we are reasonably satisfied with the licenses for electronic resources that we have negotiated on behalf of Monash University Library, there is one problem that is fundamental to the issue of licensing of intellectual property .

What licenses do, by definition, is to create a category of "authorised user". In the case of most of the licenses acquired by the University, this authorised user is granted rights at least equal to those that are granted to the general public under the copyright law. The problem is that anyone who is not an "authorised user" has no rights to use the materials. In other words the licensee is limited regarding to whom it can make the licensor's products available for the "non copyright uses", i.e. for reading, viewing, listening, lending, etc.²

This may be less of a problem when the licensee is an organisation that serves a relatively closed community, like a university or a commercial organisation. However it would certainly become a major problem, if this kind of licensing became the norm for the mass-marketing and distribution of intellectual property in electronic form and in particular e-books.

Other problems with licenses. Beyond this, our main points of contention with licenses have been:

(a) They are sometimes unreasonably narrow in their definition of what is an authorised user (e.g. must be a "registered student", an employee, must reside on a certain campus, work in a certain building, etc.). Our experience is that it is now easier to negotiate changes in license agreements on this item. In particular access by "walk-in" users is now well accepted. There are still occasional problems with negotiating licenses for our overseas campuses, although, surprisingly, no geographical restrictions are placed on the location of our individual (Distance Education) students.

(b) They require the Library to police the activities of authorised users, although the obligation is often softened by "reasonable efforts" clauses.

(c) Once the University stops paying for the resource it does not always retain access to ("authorised use" of) even those parts it has paid for. I.e. authorised usership is dependent on ongoing payment - like being a member of a club. This too is changing. The main problem is that vendors themselves are unsure about how they are going to provide guaranteed "perpetual" access.

¹ Lynch, Clifford. The battle to define the future of the book in the digital world.
http://firstmonday.org/issue6_6/lynch/index.html

² These are the rights referred to in the American copyright literature as rights acquired under the First Sale doctrine.

Other concerns that have been raised occasionally with licenses in the University environment are :

(d) Prohibition of the use of the material for certain kinds of purposes, in particular commercial purposes, e.g. the use by academic staff of the information/data derived from these electronic sources in paid consultancy work. Of course no such restriction applies to sources of information in print form.

(e) Extent to which the material extracted from a licensed data base or other compilation can be used in the creation of derivative products, e.g. specialised bibliographies.

(f) Limits on the use of material for inter-library loan – which is in essence just another manifestation of the limited authorised user community issue.

(g) The fact that the licenses often cite the applicable law and jurisdiction as the laws and jurisdiction of the country of the vendor. As many of the vendors of scholarly publications are based in the United States, licenses often specifically cite U.S Copyright Law and the CONTU guidelines with respect to fair use, rather than Australian Copyright Law and it is difficult to negotiate changes in these clauses.

The Digital Agenda Amendment Act, 2000. Until March 2001, licenses were useful because, in the absence of Copyright legislation that related specifically to electronic materials, licenses gave us a fair degree of certainty with respect to permitted use of those materials.

Since then the Digital Agenda Amendments to the Act have come into force, but although this has added some certainty and extended the fair dealing and library exceptions to the digital arena, the changes in the Act are not necessarily of great value with respect to electronic resources acquired by libraries from third party vendors.

From a library perspective, the most significant aspect of the Digital Agenda Amendments relates to the digitisation of analogue materials. And it has been suggested that in both the near and longer term future, the ratio of electronic materials acquired by libraries from third party vendors compared to the number of electronic materials created by libraries in-house will quite probably be 1000:1.

Copyright Act more restrictive than Licenses. Following the amendment of the Copyright Act by the Digital Agenda Amendments, some of the sections relating to libraries are now actually more restrictive than most of the licenses with which I am familiar. For example the new Subsection 5A to Section 49 prohibits the downloading and communication of the material AND requires the Library to disable the capacity to do so on the PC. Most licenses do permit downloading, and printing of reasonable portions of the materials and are often more generous in the use of these extracts. For example, under some licenses authorised users are permitted to distribute a copy of individual articles or chapters or sections of the licensed materials in print or electronic form to other authorised users and to other specific individuals in “person to person” and non-systematic scholarly exchanges of information.

There is also the amended Section 50, subsection 7A and the new subsections 7B and 7C, regarding inter-library loans. These clauses are on the face of it more generous than most licenses. However I do not know how convenient it would be in practice to satisfy the conditions under 7B (e) (iv) with respect to the reproduction of a reasonable portion of a work other than an article.

Finally, Parts VA and VB of the Act has now been extended to the digital world. However even before that happened, due to pressure by universities, licenses began to include clauses permitting the use of the licensed materials in course packs or for electronic reserve. This is of course without additional charge. Whereas use of this material under the statutory licenses involves payment of remuneration to the copyright holder via Screenrights or CAL.

Issue 4

With respect to Issue 4, I would strongly support legislation that would outlaw the possibility of overriding provisions in the Act by contract – but only in those cases where such contracts would exclude or modify the exceptions to the exclusive rights of copyright owners. The fact that, for a variety of reasons, this is not happening a great deal at present in the industry that I work in and am familiar with, does not change my in-principle support for such legislation.

Issue 5

I do not have an opinion on Issue 5.

Issue 6

I am strongly of the opinion that limitations should be placed on the enforceability and use of mass market agreements. I already instructed my staff a year or two ago that whenever they encounter a click-on license for a data base, they should contact the vendor with the following advice:

“(a) The Library is instructed by University management to submit all license agreements for scrutiny by the university solicitor after which they are signed by a senior delegated officer, if the conditions are acceptable. This procedure does not leave room for the use of “click-on licenses”. We would therefore like you to adapt your license to a more conventional form.

(b) In any case we have some concern about certain terms and conditions of the license which we want to negotiate. These are This is another reason why we want to negotiate a conventional license with you.”

We have taken the view that if the vendor is really interested in making a sale then they will respond positively to our request. Actually we see very few click-on licenses in the library.

Issue 8

With respect to Issue 8, I believe that significant danger signs are emerging from the US (UCITA) initiative, early as it is in the implementation of that regime and we would not want to see similar legislation enacted in Australia. Without knowing exactly what caused the Attorney-General to give your Committee reference at this time to look into this copyright vs contract issue, clearly the UCITA development would have to be a compelling reason. As mentioned above, libraries will probably continue to be able to avoid having to accept very restrictive conditions for the more specialised materials they acquire. However libraries, in particular public libraries, also acquire materials that are in the mass market. Adoption of UCITA-like legislation in Australia would open the door to mass market licenses that may well impose conditions that are totally contrary to some of the basic objectives of libraries, such as the sharing of information resources, support of formal and informal learning and teaching programmes, and preservation and archiving of the cultural and historical record.

I trust that the Committee will agree that this would be greatly to the detriment of society.

Hans W. Groenewegen,
Deputy University Librarian.
Monash University.

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