# TIGHTENING THE NET: COPYRIGHT RESTRICTIONS IN THE DIGITAL AGE

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*Library and information professionals are often frustrated when faced with copyright restrictions. The problems which face libraries in the information society are compounded by the inadequacies of copyright. The absence of an appropriately balanced regulatory regime governing the transmission and use of digital works causes great uncertainty to authors, publishers and above all librarians. This paper provides a brief overview of the electronic copyright concerns of librarians and copyright holders and outlines the possible solutions. The importance of maintaining the exceptions to exclusive rights to allow copying and use is also discussed.*

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## Introduction

The aim of this paper is: to outline the issues surrounding electronic copyright (awareness raising); to discuss some of the possible solutions; and finally to report on progress.

We are now in the Information Society which holds the promise that information will be available to everyone: "The information society initiative promotes the beneficial use of information and communications technologies across all areas of life" [Ian Taylor, former Minister for Science and Technology at the Department of Trade and Industry]. The digital revolution has made a great impact on libraries. This has created expectations that advances in optical storage and data compression will greatly increase the capacity for storage and information retrieval, and that the enhanced bandwidths will be available to be used to improve services to users and be to the good of all. This is not yet possible. Digital technology brings us the dream. Copyright brings us the nightmare.

In the analogy of spiders or flies, I am not sure who plays what role. All I know is that the information society webs are not in everyone's backyard! The larger public interest, in having access to information, ideas and knowledge, must not be forgotten. I believe that it is the library's role is to ensure that access is available for all.

## Electronic copyright

Electronic copyright is the same as copyright: a system which gives legal protection to works of the mind so that the owners of such works may control the way their works may be exploited, and can be rewarded for their intellectual labours. The difference between copyright and electronic copyright is that works cannot be accessed and read unless they have been decoded first. Works in

electronic format may be very complex and involve many copyrights. The problem lies in the fact that they are easily copied.

Digital technology has made it easier to make copies of protected works and these copies have no loss of quality. Digital technology allows for greater storage and easier access and retrieval. Works can be manipulated and adapted and can be transmitted over the networks and around the world facilitating inter-library document supply, distance learning and supplying information to developing countries.

However, these are all restricted acts under the *Copyright, Designs and Patents Act 1988*. Even making temporary, transient or ephemeral copies in order to access and use a work is considered part of the right of reproduction and is therefore a restricted act under UK law. Mirroring and caching are caught under this definition, as are acts of downloading, uploading and even faxing.

There is much concern from rightholders, mainly publishers, over electrocopying. They fear piracy which is deliberate infringement of copyright for economic gain which they see as threatening their economic rights. Rights owners are reluctant to allow their works to be stored in digital form as it is difficult and sometimes impossible to control or detect the movement of works electronically. They fear, therefore, that they will lose control, and therefore potential revenue, of their intellectual property. Once digitised and stored in a computer, works can be transferred unseen.

Rights owners are worried that electro-copying could become common practice due to a lack of user understanding about copyright plus ready availability of facilities. Without local instruction and control, users are likely to assume that because these facilities exist there are no barriers to their use.

The main cause for concern is the ease of transfer of works. An author or a publisher will be reluctant to give carte blanche permission for a work to be electronically available without some guarantee that it will not be misused and abused, or sent around the network to countries where copyright protection is inadequate. Authors themselves are worried that their moral rights may be violated. Works can be manipulated easily while in electronic format.

Although there is nothing in the *Copyright, Designs and Patents Act 1988* which says that copying under fair dealing or the library regulations does not apply in the digital environment, in practice it is difficult and very risky to rely on them as defences. With commercially produced digital works, any downloading or forwarding is almost always with permission or under the terms of a contract. In UK law, contracts override statute law. However, it is risky to digitise print-based works in order to offer them as part of the library service - that is why projects such as Project ACORN have been set up to explore the implications. Such copying has to be under licence or with permission.

From the librarian's point of view, this is an unsatisfactory situation. Librarians are concerned with the free flow of information and become frustrated with copyright restricting access. It is administratively burdensome and expensive in staff time to clear rights. Surely there is an easier way.

**Possible solutions - statutory**

An international solution is being sought by the World Intellectual Property Organisation (WIPO). WIPO has recently hosted a Diplomatic Conference to discuss three proposed treaties which address the digital environment: a new copyright treaty, a performers and phonogram producers treaty and a database treaty. (At the conference, the Copyright and the Performers and Phonogram Producers Treaty were adopted but the Database Treaty was never discussed.) As these were important treaties which have far-reaching implications for library and information professionals, I will discuss them briefly.

Proposals in the Copyright Treaty included extending the scope of the reproduction right to include all transient and ephemeral copies and a new communication to the public right. The adoption of these two proposals as given would have made matters worse for users. As it turned out, although the Communication Right was accepted, because of user pressure, the extension of the scope of the Reproduction Right was not included, and was replaced by an unagreed statement.

The new treaties do have provision to allow national governments to provide for limitations of, or exceptions to, the rights granted to authors of literary and artistic works under the Treaty. Article 10 of the Copyright Treaty states that "in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author". This wording is lifted straight out of Article 9(2) of the *Berne Convention*[1]. There was also an agreed statement to Article 10 which gives governments a green light to extend exceptions to fit the digital age: "...Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the *Berne Convention*. Similarly, these provisions should be understood to permit contracting parties to devise new exceptions and limitations that are appropriate in the digital network environment."

Could this mean that there might be a glimmer of hope that the UK Government, as a signatory, will resolve some of the concerns caused by the tight restrictions on copyright in digital works? It is possible but unlikely, unless there is a concerted effort on behalf of the user community to put pressure on the Government. The forthcoming *EC Directive on Reproduction Right and Harmonising of Exceptions* is likely to contain similar proposals to those contained in the WIPO documentation, namely to extend the scope of the reproduction right to include all ephemeral and transient copies and as this definition is already in the *UK Copyright, Designs and Patents Act 1988*, it may be difficult to remove. The user community will have to push for suitable limitations to this right.

### Possible solutions - technical

Various research projects are looking into effective technical solutions - Electronic Copyright Management Systems (ECMS) - such as encryption, tagging, digital fingerprinting, data identifiers, watermarking etc. Depending on their sophistication, these will be able to track and control movement of works in digital form. Is this a good or bad thing?

It is likely that applying such controls will be too expensive for the majority of packaged information and may only be applied to large multimedia products. But what about the majority of digital print information? Will this be encrypted too? Our view is that too much control, like having to pay too high a price for access, may be a significant barrier and lead to non-use.

It is important that a balance is achieved between control and access. ECMS need to be relaxed or removed for certain legitimate purposes. What happens when a work falls into the public domain? What about copying under a statutory exception? There is also the question of civil liberties. If all hits are tracked and controlled, what price privacy?

### Possible solutions - contractual

In many cases, the difficulties over copying legally under a statutory exception are resolved by licensing. Unfortunately, there is no one body which can license electronic use. The Copyright Licensing Agency, which licenses certain printed literary works, has no mandate from authors or publishers to offer such a scheme for works in digital form. There is no comprehensive clearing system available to clear rights on an individual basis.

Publishers would like to tie us up contractually and so deny us any statutory right to copy electronically. Is it practical, to have to contract with every publisher, or even every author, if a publisher does not handle the electronic rights? Is this the future we want? Can we trust rightsholders to give us reasonable access with minimum payment? Will such an arrangement cover all our future needs to provide an information service which meets the needs of the information society? If not, I fear for the future.

### What progress?

What library and information professionals want is to provide adequate and equal access for all. We would like fair dealing to work in practice in the digital environment. We want statutory exceptions for librarians to deliver documents electronically. We want legal

backing to preserve and conserve our materials in digital form. We want to be able to copy for certain non-commercial purposes. We want information to flow smoothly on the networks. Are we being that unrealistic?

## Projects

There are so many initiatives in this field mainly funded by the European Union (EU) and the Joint Information Services Committee (JISC) that I am only able to list a few.

- In the EU, there is European Copyright User Platform (ECUP) which is involved in awareness raising and trying to come to an agreement with publishers, authors and other interested parties on copying digitally. This is proving to be extremely difficult.
- Another project funded by the EU, IMPRIMATUR, aims to build consensus for rights trading in the information society. The parties are looking at ECMS.
- The Publishers Association and JISC have a joint working party which is looking at fair dealing in the electronic environment in the higher education sector. We await results with great interest
- Also in the higher education (HE) sector, the UK Pilot Site Licensing Initiative (PSLI) is currently in operation. The funding bodies have entered into an agreement with four publishers: Academic Press, Blackwell Publishers, Blackwell Science and Institute of Physics Publishing, to enable access by HE bodies to an extensive range of the electronic versions of their journal output. This is promising but could prove uneconomic when the funding is reduced.
- Project ACORN, the eLib project looking into the feasibility of an electronic reserves collection, is providing useful data on the problems faced when trying to obtain permission to copy digitally.

## Conclusions

The problems which confront libraries today are compounded by inadequacies of the law of copyright. The absence of an appropriately balanced regulatory regime governing the transmission and use of digital works causes great uncertainty to authors, publishers and above all librarians.

Some members of the legal profession agree that the EU is losing sight of the public interest. In a recent lecture, the ex Chief Justice of Australia, Sir Anthony Mason, has said that, in the interests of balance, the fair dealing concept must be preserved. Just because it is difficult to apply, does not mean that it has to be abandoned altogether! If the fair dealing concept is to be changed then we must push for the American Fair Use exception which may be a more flexible arrangement to suit the digital environment[2]. Much is said about protecting copyrights in order to give creators an incentive to create, but, potential authors need to be able to build on the works of others in order to gain ideas for future creations. Not being able to access works easily could be a *disincentive* to create.

Although several parties are endeavouring to resolve the issues surrounding the access and use of electronic works, it will be up to the lawmakers to make the final decisions. It is they who we must persuade to look to public, as well as to the economic, interest. The experience of WIPO has convinced me that librarians can be strong and should campaign to change the inadequate copyright laws. If nothing is done soon, we will all be entangled in the copyright web.

### References

1. Berne Convention for the Protection of Literary and Artistic Works. Paris Act 1971. WIPO 1989
2. The 1997 Herchel Smith lecture at the Institute of Advanced Legal Studies.