Recent Developments on the Copyright Scene

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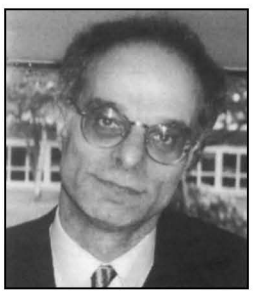
The copyright scene is one of confusion and change. There are five areas that are the focus of current attention. They are: the European Union (EU) draft directive; changes to Crown Copyright; Higher Education Resources ON-demand (HERON) and National Electronic Site License Initiative (NESLI); Joint Information Systems Committee (JISC)/Publishers' Association (PA) work; and a survey of higher education institution (HEI) intellectual property rights (IPR) policies.



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The EU Draft Directive

I think it is worth stressing that a directive is an instruction from the European Commission to member states to change their laws. If a member state fails to change its law within the stated time period – typically two or three years from the date of passing of the directive, then the member state has broken EU law.

Any interested party can then make a complaint to the Commission, which in turn can prosecute the member state for its failure to implement the directive. Typically, the result is that the member state is fined and that the wording of the directive gets taken to be the law of the member state concerned. So a directive is quite a big deal. However, what is NOT a big deal – at least not so much of a big deal – is a ***draft*** directive. This is a proposal from the Commission for the wording of a possible directive. There has been much alarm and publicity over the draft directive on copyright because it was recently rubber stamped (and indeed recommendations were made for it to be made ever more strongly biased towards owners' rights) by the European Parliament. This alarm is misguided. The European Parliament has very little say on copyright directives. Even if it had said it was totally opposed to the draft directive, this would be of little significance.

This does not mean there is nothing to worry about. Indeed, I would strongly argue that we DO have something to worry about with this draft directive. If it is finally passed by the Council of Ministers in the form in which it is currently worded, it would have a severely damaging effect on library activities dealing with electronic information in the UK. But draft directives have to go to the Council of Ministers for approval. Many get amended at that stage, many others get rejected out of hand. So it is a very big IF in my phrase: "if it is finally passed by the Council of Ministers in the form in which it is currently worded."

I do not want to go into the details of the draft Directive, other than to say that as presently worded it would severely restrict the

ability of libraries to get access to, and to disseminate electronic information to their patrons. It would also hit hard on the concept of fair dealing in the electronic environment. The message I want to give you today regarding the draft directive is simply this: now is the time to be lobbying the relevant Ministers (who are Kim Howells, Ian McCartney and Stephen Byers) and supporting the efforts of organisations such as Standing Conference of National and University Libraries (SCONUL), JISC and the Committee of Vice-Chancellors and Principals (CVCP) in their lobbying. The more lobbying that takes place in the next few weeks, the more chance that the UK will oppose the draft, or get it amended. The United Kingdom Serials Group (UKSG) should be lobbying, as should individual institutions.

It is worth stressing the reasons why it would have an impact on libraries. The first is that many licences include the words 'except as permitted by the Copyright Act', 'Nothing in this licence shall prevent a user from doing things that are permitted under the Copyright Act' or similar. So, if the Copyright Act does not permit much in the way of copying, the users' position is weakened. The second reason is that not all copying is licensed. Much copying of one-off items on a casual basis is done under fair dealing rather than under licence. This would no longer be possible.

Changes to Crown Copyright

The role and future of Crown Copyright has been up for grabs ever since the House of Lords Select Committee on Science and Technology's report on the Information Society in July 1996 argued for a complete review on the reason for its existence. The Government in its response announced the formation of a group to review the management of Crown Copyright in the future. The group issued a Green Paper in 1998, entitled 'Crown Copyright in the Information Age'. As a result of comments received on this Green Paper, the Government issued a White Paper, entitled 'The future management of Crown Copyright' at the very end of March (http://www.hmso.gov.uk/document/copywp.htm).

Although they did not get a massive number of comments, only two respondents wanted the current regime of Crown Copyright to continue. The largest number of respondents chose the option of abolition of Crown Copyright altogether, so that all material created by government is automatically in the public domain. This is, incidentally, the situation in virtually all other member states of the EU, and the USA. However, this idea also attracted the largest number of respondents who were totally opposed to the idea. It is also worth noting that this would require a specific amendment to the Copyright Act 1988. A less controversial but widely acceptable alternative was to retain Crown Copyright, but to waive it in many sectors and even where it is retained, to be more relaxed about its management. This needs no change to the law, just to custom and practice.

What the White Paper recommends is the following regime:

- Improved and streamlined access to government created materials.
- Coherent licensing of all government information.
- Transparent licensing and charging terms. These will be featured on the government web site. Disappointingly, the government will reserve the right to charge in those cases where the information is used for commercial re-publication, and insists that any re-publication should add value in the form of commentary, indexing, provision of text retrieval software and the like.
- A new Information Asset Register (IAR) to help identify items of relevance. The IAR will be an effective retrieval tool to complement other methods of searching for government information. The government wishes to consult with the library community on this project. Indexing will be by generic subject matter and using commonly employed words such as 'dole'. Typical entries on the register will be: title ; identifier; database acronym; description; source; language; creator; format; date of last update; updating frequency; subject keywords; coverage; contact/distributor' and copyright notice or a rights management statement.
- Increased use of waiver of Crown Copyright, to include: primary and secondary legislation (but not the Statute Law Database); notes to legislation; government press notices and press releases; government created forms; Green Papers and other consultation

documents; anything on the government web sites; anything of a scientific, technical and medical nature; text of ministerial speeches, and unpublished public records, such as those held in the Public records Office (PRO). The copyright in the typographical layout will also be waived. Note that amongst the items still under full control are Hansard; personal and confidential materials; White Papers; court judgements and tribunal reports; Select Committee Reports; departmental logos and crests; and many occasional publications. Even where the copyright is waived, the government will keep an eye on what is done with the materials and will prosecute if the integrity of the material is attacked, or if the government itself is subjected to ridicule as result of amendments.

- Increasing emphasis on electronic exploitation of Crown Copyright materials.
- Clear co-ordination and control by Her Majesty's Stationery Office (HMSO). There will, however, be continued delegation to government departments to handle copyright arrangements where appropriate.
- Extension of these principles to government related information which is not Crown Copyright, such as local government and other areas of public sector information.
- Government departments should never grant exclusive rights in Crown Copyright materials to any individual or organisation without the express permission of HMSO.
- Government departments should never embargo arrangements which deny access by licence to material that has been published.
- Government departments may never assign Crown Copyright to any third party.
- Government departments should pro-actively encourage access to their data and promote its quality, and should make more material available electronically.

Chapter 11 of the White paper is entitled 'the role of libraries'. It is short and rather disappointing, but envisages low cost or no cost licences for libraries to exploit Crown Copyright materials. It also states the Government is in discussion with the Copyright Licensing Agency (CLA) to see if HMSO materials can be brought into the ambit of CLA's licensing schemes.

Overall, then, I regard this as a disappointing White Paper because it is not ambitious enough, but it is certainly a step in the right direction. It would be appropriate here for UKSG, SCONUL and other bodies to be lobbying Government – this time it is the Cabinet Office under Jack Cunningham confusingly enough – to ensure that HEI libraries get full access to as much Crown Copyright material as possible at minimum or no cost.

HERON, NESLI and JISC/PA

Librarians have responded to the serials crisis in a number of ways. One way is the use of IT. They have always been enthusiastic users of IT - their use of online databases, CD-ROMs and library automation systems have a long history. So librarians want to have access to digitised materials. In the early 1990s the first HEI librarians began to approach publishers for clearance to digitise. The Publishers Association became seriously concerned by the threat (and I use the word 'threat' advisedly, for that is how the PA viewed it) raised by these matters, and around 1991 it issued policy statements that claimed that the PA was working on an approach involving a somewhat complex clearing house system that would consider individual permissions to electrocopying requests. There were good reasons why publishers should have concerns. Once something has been electrocopied, it is easy for any person with access to this digitised material to send it around the world to thousands or millions of people. This, of course, could lead to loss of sales of the original materials by the publisher. Furthermore, the copies would be perfect, it would cost the perpetrator virtually nothing to do this copying and such actions would be difficult, if not impossible, to police.

There is also the risk that something in digitised form would be amended and yet still have the appearance of the original text. In other words, it appears to have all the authority of the publisher, with all the associated quality control and yet perhaps have serious errors or misleading statements in it due to the unauthorised changes. Dissemination of such unauthentic copies could lead to the loss of reputation for the publisher.

So, because of fears of both loss of revenue and loss of reputation, publishers were anxious to keep

a lid on the genie of electrocopying. Thus, around 1993, it was clear that publishers and librarians were moving into opposing entrenched positions, with the publishers, no doubt influenced to some extent by the PA statements, refusing permission and librarians becoming more unhappy about the denial of what they regarded as a perfectly legitimate request. This potentially serious situation was noted in the Follett Report at the end of 1993. Although the Report itself did not come up with any clear suggestions, Follett laid the foundation for a solution to the problem. This was the launch of the electronic libraries programme of JISC (eLib) in late 1994.

Many eLib projects involved asking for permission to digitise materials. As a result, by the middle of 1995 a number of publishers found themselves at the receiving end of uncoordinated approaches by a variety of eLib projects requesting similar things.

I think it is fair to say that the publishers felt alarm about the uncoordinated approach of so many projects to so many publishers and this alarm was communicated to the committee then ultimately responsible, the Joint Information Systems Committee, or JISC. The result was the JISC/PA wor, of which many of you will be aware, for developing agreed statements on what is fair dealing, pricing algorithms for digitising and standard licence terms. Current work is underway on developing guidelines or a system for handling document supply requests in an electronic environment. Copies of the various JISC/PA working papers are available on the Web, or in printed form.

eLib, too, has played a part, by funding two important initiatives. The first of these is the National Electronic Site Licensing Initiative (NESLI). This initiative is being subsidised by eLib programme for the first couple of years of its life, and then it will sink or swim by itself. A similar initiative, but this time in respect of individual articles from journals or book chapters, is HERON. Here, too, we are talking about an eLib funded project that has eventually to stand on its own two feet. Blackwell's is the major commercial partner. The idea, too, is a one stop shop and a standard licence, but the difference is that the fee will be a modest amount for each item chosen, rather than a blanket licence for a high fee. Staff and students will be able to read, print out or download materials obtained. HERON is due to be launched in the summer of 1999.

Survey of IPR in HEIs

JISC has just announced that it is funding research on IPR policies in HEIs. This relates to the particularly contentious matter of who owns copyright in materials created by HEI staff. The law itself indicates that copyright in such materials are usually owned by the HEI, but custom and practice has been to leave copyright in such materials in the hands of the academics. This is sometimes counter-productive, as the academic may be too willing to assign copyright to a publisher. In some HEIs, the institution requires that copyright in all teaching materials is assigned to the HEI. The Association of University Teachers' (AUT) approach to teaching materials is to let the academic retain the copyright, but that (s)he gives a free licence to the employer to reproduce. When an academic leaves the employment of the HEI to go to another one, the old employer rarely insists that materials created by the academic are left with the old employer. In many contracts of employment, the matter of research output is not mentioned at all. The AUT's approach for research output is that copyright belongs to the academic.

Other recent developments include the Authors' Licensing and Collecting Society (ALCS) initiative for academics to no longer assign copyright to publishers, but to retain it, and to *license* publishers to reproduce the materials. The failure of HEIs to adopt a common approach means that there is no 'level playing field' in which academics, publishers, librarians and other stakeholders can operate.

The issue is important, because HEIs are increasingly recognising the value of IPR created by their staff. The time is therefore ripe for a critical overview of the law and current custom and practice with a view to recommending best practice. JISC is therefore funding a project (to be run by Strathclyde University) to examine current practice and to make recommendations. This research has not yet started, but could have a crucial medium term impact on the costs paid by libraries for accessing electronic scholarly information.