Licences for Digital Resources

In this information sheet, we outline important issues affecting the management of digital resources such as online journals, digital music, digital video content and software.

The purpose of this information sheet is to give general introductory information about copyright. If you need to know how the law applies in a particular situation, please get advice from a lawyer.

Key points

• uses of digital resources are primarily governed by a licence rather than by the Copyright Act;
• the licence may allow uses not allowed under the Copyright Act, and vice-versa;
• it is important to fully understand the licence conditions for a product before you purchase it;
• procedures for managing digital resources can enhance the use of the resources and avoid problems.

Copyright, contracts and digital material

Most copyright owners of digital material provide their material under licences. This means that if you are using material in digital form, how you can use the material will be determined by the licence, rather than provisions in the Copyright Act.

Examples of licensed digital resources are:

• online journals;
• online databases;
• computer programs;
• e-books;
• stock imagery;
• multimedia items in electronic form (such as interactive games); and
• digital film and music.

If you are acquiring legitimate material, you will invariably receive some form of licence from the copyright owner to use the material. This licence may not allow all the uses that you would like to make of the material or even uses you may be permitted under the Copyright Act. Therefore, it is important to understand the terms of the licence agreement before you purchase digital material.

Provisions in the Copyright Act

Where an exception in the Copyright Act applies, you can use copyright material without permission and without infringing copyright. However, if you agree to a licence that prohibits a
certain use that would otherwise be permitted under the Copyright Act, you may breach the contract (even though you do not infringe copyright). On the other hand, licence agreements can grant you more extensive rights to use material than what may be permitted under the Copyright Act – for example to copy the whole of a document or film.

**Temporary copying**

Technically, activities such as running a computer program or browsing a website or online database involve making temporary reproductions of the copyright material in the computer. Exceptions in the Copyright Act allow you to do these activities without infringing copyright, provided the material reproduced is not an infringing copy.

**Making a backup copy of a computer program**

The Copyright Act permits you to make a back-up copy of a legitimately acquired computer program. However, the exception is very narrow: it does not cover text files or images which might be within a piece of software. Nor does the provision allow back-up copies to be made of any other digital material such as computer games (unless they only contain computer programs). In practice, check the licence that accompanies these items to determine whether backup copies may be made: frequently, making a back-up copy is expressly permitted, although sometimes it may be prohibited.

**Educational, library, government and fair dealing provisions**

Educational institutions, libraries and governments may rely on relevant provisions in the Act to deal with copyright material in digital formats. However, if a licence restricts or prohibits an action, the organisation might breach the contract (even though it would not infringe copyright) if it acts otherwise in accordance with the licence agreement. In reality, the licence (not the Copyright Act) will most often determine what you can and can’t do with the material.

**Licences and contracts**

In copyright terms, a licence means a permission to use the copyright material in particular ways. A contract is an agreement binding on the parties.

**Elements of a contract**

The following elements must be present before you have a contract (a legally binding agreement):

- an offer;
- acceptance;
- benefit to all parties (“consideration”).

Sometimes, a party does not want to accept the terms initially offered and makes a “counter-offer”, which may then be further negotiated. A contract is not binding until an offer is accepted without further conditions.

Terms and conditions are generally set at the time of acceptance and cannot later be changed or revoked without all parties agreeing to the new terms.

A licence does not have to be part of a contract: in some cases, a copyright owner will give permission without asking for anything in return. For example, some publishers package digital versions with printed books without requiring users to agree to anything before installing or accessing the digital material. In such a case, the purchaser will have an implied licence, perhaps to load the digital material onto a single computer, but probably not to upload it to an
intranet or server. Implied licences are generally narrow: the minimum required to make sense of the situation.

However, in most cases, when you acquire a digital resource, you will enter a contract either at the time of purchase or of installing, downloading or accessing the resource. This contract will grant you an **express licence** to use the material in stated ways, in return for your agreement to do certain things (such as pay for the resource, and agree to abide by the stated terms and conditions).

**Shrink-wrap, click-wrap and statements on websites**

In some cases you may not be asked to express formal agreement with terms and conditions: you may see statements that your agreement is indicated by the act of unwrapping a software package ("shrink-wrap") or clicking on a link to download material ("click-wrap"). If you click on an “I agree” button, for example, you should generally assume that you are legally obliged to comply with the stated terms and conditions.

Some websites include statements that by using the website you agree to terms and conditions of use. Such statements are sometimes found behind links with headings such as “Legal”. If you do not have to indicate agreement before accessing or downloading material, it is not clear that such a statement is legally binding on you, especially where the terms and conditions were not sufficiently brought to your attention. However, this will depend on all the circumstances. It may be that if the terms and conditions have been sufficiently brought to your attention and you continue to use the service, it may be argued that you agree to the terms and conditions.

**Creative Commons licences**

Creative Commons licences are a form of licence that copyright owners can choose to release their material under without claiming payment for the use. The licences have a range of conditions that may be selected, such as that the material can only be used for non-commercial purposes or that the material cannot be used to make a derivative work.

For more information, see our information sheet *Creative Commons Licences* and the website of Creative Commons Australia: www.creativecommons.org.au

**Procedures for acquiring electronic resources**

In order to be certain that the licence you are entering into is appropriate for you, be prepared to spend time on the licensing procedure. Before looking at a licence agreement, assess carefully why the particular digital resource is required, including identifying who needs to access the resource and to whom material from the resource will be distributed.

Become familiar with reading contracts and with the types of terms used in agreements concerning electronic resources. It is important to be able not only to understand what rights you are acquiring, but also what obligations you are taking on.

If necessary, discuss your needs with the distributor and negotiate for a licence that covers the types of uses of the resource you have identified. Consider seeking legal advice to clarify rights or obligations, and to assist in properly drafting an agreement.

If you decide not to purchase because of particular licensing restrictions or obligations, let the vendor know. It may be that the vendor will be willing to negotiate a one-off agreement to suit your circumstances.

Counter-intuitively, for textual material it may be that if you can obtain the work in an analogue format, you have more flexibility in how you can use it. For example, instead of licensing a digital journal, which limits how many computers can access the journal, you might subscribe to have a physical journal sent to you. Once you have a legitimate copy of the journal, you can share it with
as many people as you want. You may also be able to copy the text under an exception to copyright such as fair dealing.

Managing electronic resources

Just like maintaining a library, you should manage your digital resources:

- keep a register which contains details of all licences and make sure you retain any written agreements;
- provide summaries of licence rights and restrictions near terminals that are used to access the relevant resource;
- consider developing a centralised and systematic procedure for purchasing software, CD-ROMs online resources and other digital material; and
- develop procedures for regularly checking computers (both staff and open-access) for infringing material.

The website of the Business Software Alliance at www.bsa.org has information and resources relevant to software management and compliance, which can be adapted to manage other digital resources.

Technological protection measures & electronic rights management information

Copyright owners can generally take legal action against anyone who, for example:

- circumvents an access control measure (such as encryption or a password);
- makes, imports or trades in a device to get around a technological protection measure (relating either to copy control or access control); or
- offers a circumvention service.

In serious cases, these activities can also be criminal offences.

There are some exceptions, including exceptions that permit educational institutions and libraries to circumvent access controls when relying on specified provisions within the Act and when making acquisition decisions.

You should also avoid removing or altering any “electronic rights management information” (ERMI) from digital material. ERMI is things that copyright owners embed into digital items to show they are the copyright owner. For example, watermarks and metadata. In some cases, removing ERMI may be a criminal offence.

Frequently Asked Questions (FAQs)

I've got a laptop and a desktop computer at home. Is it OK to upload a copy of software I've purchased onto both of these devices?

You should check the software licence to see how many devices you are permitted to load the software onto. Many software licences will allow the use of the software on several devices provided that each device is located within the one household, or is owned by a single person or family.
Do we need permission to use clip art or stock images in our publication?

Clip art and stock images are often available from software companies and websites under licence agreements. Before using these materials, you should read the licence terms and conditions carefully (if it is clip art, you may need to look to the software terms more generally), as the licence will specify the ways in which the images may be used. Consider whether the licence is appropriate for your needs. For example, if there is a statement that says the uses of the images are limited to private, non-commercial uses, you should seek permission before incorporating this material into anything you are creating for commercial purposes.

We have purchased several digital subscriptions for our school library. Can we copy material for our students under Part VB? Our provider says this is not permitted.

You’ll need to check the licence terms and conditions to see what you can do with the material. If you have entered into a contract in order to obtain the material, then it’s possible you won’t be able to rely on exceptions in the Copyright Act (such as Part VB). You should always read the licence agreement before purchasing digital subscriptions to ensure these are compatible with the ways in which you wish to use the material. If they aren’t, then you might try to negotiate with the provider to see if you can come to a special arrangement.

Can I lend my friend a copy of a computer game I downloaded through Steam?

When you buy digital material such as ebooks, computer games or software, you also get a licence from the copyright owner to use the material in certain ways. The ways in which you can use the material are determined by the terms and conditions of the licence. Many such licences limit the number of users entitled to access the material, or limit the number of machines to which it can be installed. If you allow the material to be used in ways not allowed by the licence, you are likely to breach the contract and infringe copyright.

Further reading

For information further information on digital licensing for libraries, see the National & State Libraries Australasia E-Resources Consortium (NSLA)’s Statement of Principles Guiding Licence Negotiation at www.nslaconsortium.org.au/about/licenceprinciples.html

Further information

For further information about copyright, and about our other publications and training program, see our website – www.copyright.org.au

If you meet our eligibility guidelines, a Copyright Council lawyer may be able to give you free preliminary legal advice about an issue that is not addressed in an information sheet. This service is primarily for professional creators and arts organisations but is also available to staff of educational institutions and libraries. For information about the service, see www.copyright.org.au

Reproducing this information sheet

Our information sheets are regularly updated - please check our website to ensure you are accessing the most current version. Should you wish to use this information sheet for any purpose other than your reference, please contact us for assistance.

About Us

The Australian Copyright Council is an independent, non-profit organisation. Founded in 1968, we represent the peak bodies for professional artists and content creators working in Australia’s creative industries and Australia’s major copyright collecting societies.
We are advocates for the contribution of creators to Australia’s culture and economy; the importance of copyright for the common good. We work to promote understanding of copyright law and its application, lobby for appropriate law reform and foster collaboration between content creators and consumers. We provide easily accessible and affordable practical, user-friendly information, legal advice, education and forums on Australian copyright law for content creators and consumers.

We provide easily accessible and affordable practical, user-friendly information, legal advice, education and forums on Australian copyright law for content creators and consumers.

The Australian Copyright Council has been assisted by the Australian Government through the Australia Council, its arts funding and advisory body.

© Australian Copyright Council 2014