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Copyright issues for law libraries

Article for Australian Law Librarian

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Copyright law doesn't stop librarians or their clients opening and reading books or other material—whether for personal, legal or commercial purposes. However, whether or not a librarian or a client can *copy* that material will depend on copyright law and, increasingly, on contract.

In this article, I/Ian McDonald looks at some of the copyright and contract issues relevant to librarians working in libraries in law firms, courts and university law departments.

Provisions in the Copyright Act

Under the Copyright Act, a "fair dealing" can be made with copyright material for various purposes, including for research or study and for the purpose of giving professional legal advice.

There are also provisions that library staff will sometimes be able to rely upon to assist clients or to copy material for internal purposes.

Research or study

Students and researchers such as academics and writers will often be able to rely on the "research or study" provisions,¹ but it is unclear whether a lawyer could rely on these provisions when undertaking research as part of his or her job.

There are two issues: whether or not such use is for the purpose of "research" as understood in the context of the Copyright Act; and whether, in any particular case, copying or otherwise dealing with the copyright material is "fair".

The Supreme Court of Canada has recently taken a broad approach to the interpretation of "research":²

"Research" must be given a large and liberal interpretation ... Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the Copyright Act [the relevant Canadian provision].

After looking at the particular circumstances of the case, the Court found that the copying by and for lawyers was a "fair dealing" for the purpose of research. and therefore did not infringe copyright.

¹ Sections 40 and 103C. In this context, I mean academics pursuing their research interests, not copying for teaching purposes. There are a number of specific provisions in the Copyright Act which allow "educational institutions" to deal with copyright material in various ways without permission, including for teaching purposes. For a brief overview of these provisions, see the Australian Copyright Council information sheet *Educational Institutions*, available for free from its website at www.copyright.org.au.

² *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 SCC 13. File No. 29320, at para 51.

However, in an opinion quoted by the Copyright Law Review Committee, a former Chief General Counsel of the Commonwealth Attorney-General's Department, expressed the view that:³

[Australian] courts could well confine 'research' to research activities such as those in universities and the CSIRO, for the purpose of increasing knowledge in the community as a whole—by contrast, for instance, with research in a Government Department for the purpose of advising Ministers on proposed legislation, or research by a manufacturing company for the purpose of improving its products.

It is also not clear how an Australian court might approach the issue of "fairness" when looking at copying by lawyers under either the "research or study" provision or under the "fair dealing for the purpose of giving professional advice" provision discussed below.⁴

Giving professional advice

Copyright clearances are not needed if someone makes a "fair dealing" with a literary, dramatic, artistic or musical work "for the purpose of the giving of professional advice" by a legal practitioner, or a registered patent or trade mark attorney.⁵

It is likely that this provision could also be relied upon by support staff (including librarians) and paralegals in law firms to provide copies of material to partners and employed solicitors who need that material to give advice. Whether or not making the copy is "fair" would need to be assessed on a case by case basis.

Judicial proceedings

"Anything done" for the purposes of a judicial proceeding does not infringe copyright.⁶ Therefore, librarians, paralegals and other people using resources in libraries can copy copyright material to use, for example, in court, in a tribunal or otherwise before a judge or magistrate.⁷

The relevant provisions don't depend on whether or not the use of the material is "fair".

Library provisions

In addition to the provisions outlined above, there are provisions in the Copyright Act that allow library staff to reproduce and communicate copyright material for certain purposes without permission, and to request other libraries to supply them with copies.⁸

The fact that a library is in a commercial firm or an educational institution does not prevent it from relying on these provisions, provided the library itself is not run for a profit. However, the fact that a library is providing services essentially as part of a commercial enterprise may in some cases limit the circumstances in which it can rely on these provisions.

³ Mr Denis Rose, as quoted in the Copyright Law Review Committee, *Report on Computer Software Protection* (Commonwealth of Australia, Canberra, 1995) at para 10.29.

⁴ When copying is for research or study, fairness is approached by looking at issues which include: the purpose and character of the dealing; the nature of the material; the possibility of otherwise obtaining the work within a reasonable time at an ordinary commercial price; the effect of the dealing on the potential market or value of the work; and how much of the work is used. It is likely that courts would use similar criteria when looking at the "legal advice" exception. For the purposes of the research or study exception not also that using one article from an issue of a periodical or 10% of another type of textual work is deemed to be fair: sections 10(2) and 10(2A).

⁵ Section 43(2); the parallel provision relating to copyright in audio and audiovisual material, broadcasts and "published editions" (section 104) does not require that the dealing be "fair".

⁶ Sections 43(1) and 104.

⁷ "Judicial proceeding" is defined in section 10(1) as "a proceeding before a court, tribunal or person having by law power to hear, receive and examine evidence on oath".

⁸ In this context, "communicate" includes activities such as faxing, sending by email, and posting to an intranet.

Copying for clients

Among the special provisions for libraries are provisions which entitle library staff themselves to copy for a client's research or study and to request other libraries to supply them with material for their clients.⁹

However, libraries within law firms and libraries supplying copies of copyright material to members of the profession may not necessarily be able to rely on these provisions. This is because the request for the material which must be made by the client must be accompanied by a signed declaration that states, among other things, that the client needs the material "for research or study" and that he or she "will not use it for any other purpose".¹⁰

It may be that the commercial or professional purposes for which a member of the profession wants material may preclude him or her from making the required declaration, and thereby preclude the library from either itself providing, or requesting another library to provide, a copy of the material under these particular provisions.¹¹

Depending on all the circumstances, it may be a safer approach for a library in a firm or a library providing copies to members of the profession not to rely on these particular library provisions, but to seek advice as to when it is able to provide or request copies under the provisions relating to the giving of professional legal advice and the use of copyright material for judicial proceedings.

In other cases (for example, when a firm or other library is wanting to circulate copies of news clippings provided by a commercial clipping service), a library may need to look at acquiring a licence from Copyright Agency Limited (CAL).¹²

Other provisions

The Copyright Act also contains provisions which, among other things, allow a library to:

- copy for replacement purposes when something is lost, damaged or stolen, or has deteriorated; and
- ask another library to reproduce and communicate published literary, dramatic, musical or artistic works for it to include in its collection.

There are various limits on the amount of particular types of material that can be copied under these provisions if the material is available commercially, and different procedures that apply. However, the fact that a library is within a commercial firm or provides services to the legal profession generally does not preclude it from relying on these provisions in the right circumstances: academic, law firm and court libraries could all, in the right circumstances, rely on these provisions.

Subscribing to electronic resources

Increasingly, libraries are acquiring digital information sources: particularly CD-ROM and on-line subscriptions.

Access to and use of these materials will generally be subject to licensing agreements—contractual terms and conditions. Contractual obligations and rights may be entirely different from the types of obligations and rights set out in the Copyright Act. Indeed, unless you take some care, you and your clients may end up with a resource which not only has only limited uses, but which also precludes you from relying on the various exceptions set out in the Copyright Act.

As a result, it is increasingly important for law librarians—in whatever sector they work—to be familiar with how to read and negotiate licensing agreements. In particular, libraries (whether in educational institutions, firms or courts) must have procedures in place to ensure that the best possible licensing terms and conditions are reached.

In general, this requires librarians to:

⁹ Section 49.

¹⁰ The declaration should also state that the client has not previously been supplied with a copy of the same material by the library. Note also that there are limits on what can be reproduced or communicated. Written requests and declarations must be kept for 4 years, and the library must mark copies with the date they were reproduced and the name of the library.

Note also that the librarian can't rely on the declaration if he or she knows the declaration is incorrect: section 49(2).

¹¹ The wording required in the declaration makes this a different issue to the issue discussed above as to whether or not an individual lawyer can rely on the "research or study" provisions.

¹² For information on the licences offered by CAL, see its website at www.copyright.com.au.

- become familiar with the types of terms frequently used in agreements for the licensing of electronic resources;
- be able to assess carefully the purposes for which a particular digital resource is required, including why it is needed, who will be using it and where it will be used or accessed; and
- have the time to spend on the licensing procedure—either to negotiate a tailored licence or to fully understand the benefits or restrictions of a particular licence so a decision can be made whether or not to purchase or subscribe to a particular resource.

Librarians also need to be aware that procedures for *acquiring* resources are only half the issue; procedures for ensuring *compliance* with licensing terms and conditions are equally important, as are procedures for ensuring that pirated resources (including software or computer games) don't find a home on the computers or other resources provided by a library or organization.

Some ways in which compliance can be promoted include:

- providing summaries of licence rights and restrictions near terminals which are used to access relevant electronic resources; and
- keeping a central database of licenses; and
- periodically checking machines to see that no more than the allowable number of copies, start-up programs or access points have been loaded or mounted within the organization.¹³

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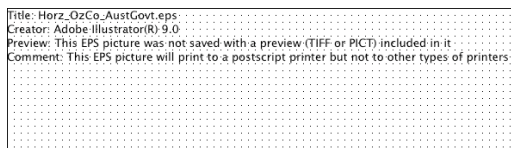
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Many of the issues in this article are discussed in more detail in various publications published by the Australian Copyright Council, and in various seminars that are offered each year in most of the capital cities. Relevant publications include *Libraries & Copyright* and *Libraries: licensing digital resources*. For more information, see the Copyright Council's website at www.copyright.org.au.

Australian Copyright Council

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



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

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¹³ You can download useful compliance resource material from the website of the Business Software Association of Australia at www.bsaa.com.au.