



**eIFL-IP  
Advocacy for  
Access to Knowledge:  
copyright and libraries**

**Handbook on  
Copyright and Related Issues  
for Libraries**

**Electronic Information for Libraries**  
[www.eifl.net](http://www.eifl.net)

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### **eIFL-IP Advocacy for Access to Knowledge: copyright and libraries**

eIFL-IP is a program of eIFL.net. The purpose is to protect and promote the interests of libraries in copyright issues in developing and transition countries. eIFL-IP is creating a unique network of library copyright specialists, building capacity amongst the eIFL.net library community in 48 developing countries and advocating for national and international copyright law reform. The vision is that eIFL.net librarians will become activists for fair and balanced copyright laws and community leaders in promoting access to knowledge, especially in the digital age.

eIFL.net has members in Albania, Armenia, Azerbaijan, Belarus, Bosnia & Herzegovina, Botswana, Bulgaria, Cambodia, Cameroon, China, Egypt, Estonia, Georgia, Ghana, Jordan, Kenya, Kosova, Kyrgyzstan, Laos, Latvia, Lesotho, Lithuania, Macedonia, Malawi, Mali, Moldova, Montenegro, Mongolia, Mozambique, Nepal, Nigeria, Palestine (West Bank & Gaza), Poland, Russia, Senegal, Serbia, Slovenia, South Africa, Sudan, Swaziland, Syria, Tajikistan, Uganda, Uzbekistan, Zambia, Zimbabwe.

Read more [www.eifl.net](http://www.eifl.net)

### **Any comments?**

If you have any comments or feedback on the Handbook, we would like to hear from you! Other topics, library statements or examples that add the perspective of a developing or transition country? Please email <[teresa.hackett@eifl.net](mailto:teresa.hackett@eifl.net)>.

### **Translations**

We encourage readers to build on and translate into your own language a selection or all of the topics. Share it with the library community. Current translations: Arabic, Armenian, Polish and Russian. Online versions and translations available are at [www.eifl.net](http://www.eifl.net).

## **Forward**

We are living in a knowledge society. Knowledge empowers people in their everyday lives and facilitates good governance and the development of democratic societies. Knowing your legal rights as a citizen, being well informed about a medical condition or having access to the latest travel, weather or leisure information enables people to take control, make informed decisions and to exercise choice. It encourages innovation, creativity and a competitive economy.

Libraries organise, collect and preserve all types of information, knowledge, cultural and learning resources for the purposes of making them available to library patrons and the general public of today and tomorrow.

Information technologies have provided libraries with opportunities to improve and develop innovative services and to serve our communities in new ways. Resources previously available only to those who could travel to the library can be accessed electronically by library users in the remotest areas. Scientists and students can benefit from access to world-class scholarly information and research data. Through digitising their collections, libraries are opening their treasures to the world.

The barriers to accessing knowledge, especially in developing and transition countries, are formidable. Financial, technological and legal "firewalls" hinder the development of the knowledge society with all its benefits. This Handbook is a practical guide to topical legal questions affecting the information work of libraries in the fast-moving digital environment. The range of issues illustrates the complexity of the world in which the digital librarian operates. Librarians should have some knowledge of the key areas, so that the library community can defend their position and can continue to fulfil their mission in the digital age. Each topic is described briefly, the main policy aspects for libraries are outlined, and there are links to library policy statements for further reading.

eIFL.net is grateful to the following people for drafting and reviewing advice: Harald von Hielmcrone (Denmark), Dick Kawooya (eIFL-IP Uganda), Ján Kováčik (eIFL-IP Slovakia) and Melissa Hagemann (USA) for reviewing Open Access to Scholarly Communications. Editorial policy and any errors or omissions rest with eIFL.net.

We hope that you find the Handbook useful. If you do, please share, distribute, translate and build upon it!

Teresa Hackett  
December 2006

## **Update**

New sections "Copyright Exceptions and Limitations" and "Legal Deposit" were added. Sections "Orphan Works", "Open Access to Scholarly Communications" and "International Policy Making: a Development Agenda for WIPO" were updated. Thanks to Barbara Stratton, and Iryna Kuchma (Ukraine) Melissa Hagemann (USA) for reviewing Open Access.

October 2009

Sponsored by  
Information for All  
An Intergovernmental Programme of UNESCO

## **THE RELATIONSHIP BETWEEN COPYRIGHT AND CONTRACT LAW: ELECTRONIC RESOURCES AND LIBRARY CONSORTIA**

### **Copyright law and contract law**

A law is an enforceable set of public rules that govern society. When laws are being made, they are usually debated by the legislature and there may be opportunities for stakeholders to put forward their views. Copyright law should reflect a balance between the rights of copyright owners and those of users of copyright material, such as individuals and libraries. As such, they may contain special provisions to allow libraries to undertake preservation activities or to make fair use of material in their collections. Printed material, such as books, journals, pamphlets, etc. are usually governed by copyright law. So when a library buys a book, it knows that the rules under national copyright law apply.

A contract, on the other hand, is a private legally binding agreement between parties who are free to negotiate the terms and conditions. A licence, which is mostly regulated by contract law, is a formal authority to do something that would otherwise be unlawful. Licences came into widespread use as a means to govern access and use of electronic products such as software, computer games, online film and music and databases. This means that most electronic material purchased by libraries is subject to a licence.

There are different types of such licences. A "shrink-wrap" licence is commonly used for off-the-shelf consumer products e.g. software or computer games on CD or DVD. A "click-wrap" licence is also a user licence, but for content downloaded from a website where the licence terms are accepted by following a "click to accept" procedure. Both types of licences are usually non-negotiable i.e. the user must accept the terms offered by the rights owner in order to access the product. (In return, there may be statutory protections to protect consumers from agreeing to unfair licence terms).

While a library may have off-the-shelf electronic products in their collections, the majority of a library's electronic resources are usually large collections of databases, electronic journals, books and newspapers, etc. purchased through commercial suppliers. All are usually subject to a licence agreement with the copyright holder (often the publisher), who will send their standard licence to the librarian. In contrast to the off-the-shelf products described earlier, it is important to note that this is an *invitation* by the publisher to negotiate the terms and conditions under which the product may be accessed and used. The librarian should read the licence carefully, amend as appropriate and return to the publisher. In other words, the librarian should negotiate the terms and conditions with the publisher. This may not always be easy to do, but it is very important because ignoring or failing to understand the terms and conditions may not stop them from applying and the library may be bound by them.

### **Practice**

The use of licences for electronic products introduced a host of new issues for libraries.

- Contract law usually takes precedence over copyright law, so anything that the library agrees to in a licence is usually binding regardless of what the copyright law says.
- Parties to a licence agreement, in this case, the library and the publisher, are free to negotiate the terms and conditions. This means that the library may negotiate extra provisions over and above what is allowed in their copyright law, or conversely, they may waive their rights granted under copyright law.

- This principle of "freedom of contract", however, often puts libraries at a serious disadvantage. Firstly, the position of the parties is unequal because the publisher has an exclusive, monopoly right over the material. Publishers, who are often international, can afford to employ lawyers to draft their licences, which are often highly technical and written in English. The licence is usually governed by the law of the country most favourable to the publisher, rather than the law of the country in which the library is situated.
- For printed material, the library and its users have potentially unlimited access. There are no restrictions placed by the copyright owner on the length of time the library may keep a book on the shelf or where the user reads the book after it is borrowed. If a library cancels its subscription to a journal, it may keep the previous issues for future use. In contrast, the licence usually provides *access* to the electronic material for a specific period of time and under the conditions as specified in the licence. This means that the library must negotiate each and every use that they wish to make of the material.

The response of libraries has been to co-operate in order to increase their bargaining power and to share knowledge and costs by forming library consortia. As well as negotiating the price and terms and conditions for electronic resources, consortia in many countries have evolved to provide other programmes and services such as training, e-portals and leadership in advancing digital libraries. The increased availability of internet-based digital material in the late 1990s led to the establishment of Electronic Information for Libraries (eIFL.net) to negotiate licences and to support the growth and development of library consortia in developing and transition countries. Consortia can be national e.g. National Electronic Information Consortium in Russia (NEICON), regional e.g. NELINET, a U.S. network or they can represent similar types of libraries, such as university libraries e.g. Coalition of South African Library Consortia (COSALC).

One of the outcomes has been the development of model licences which set out the terms and conditions which are acceptable to the library or consortium. Some model licences have been jointly developed by publishers and librarians, thus easing the negotiation process. There are model licences available to cater for a variety of situations e.g. single academic institutions, academic consortia, public libraries or special libraries. Most are publicly available online, and are a recommended starting point for any negotiation.

## **Policy Issues for Libraries**

It is the responsibility of the librarian to ensure that the licence agreement contains everything that the library requires and that it caters for all its users, whether a member of a consortium or where the resources fall outside those on offer by consortium. The library must also ensure that it meets its obligations – which should not be too onerous - under the terms of the licence.

- The library should ensure that gets the best deal for its users in terms of access and use and for its funders in terms of price.
- The library should ensure that it understands and meets the terms and conditions of each and every licence agreement that it signs. If in doubt, it should seek advice.
- The library should consider joining or forming a consortium to negotiate better deals and to assist with training, management of electronic resources, fundraising, etc.

In brief, a library should avoid a licence that:

- isn't governed by the law and courts of the country where the institution is located
- doesn't recognise the statutory rights for usage under copyright
- doesn't grant perpetual access to the Licensed Material that has been paid for
- doesn't include a warranty for IP rights and an indemnity clause against claims
- holds the Library liable for each and every infringement by an authorised user
- has a non-cancellation clause
- has a non-disclosure clause
- has reasonable and best effort clauses for obligations on the Publisher
- has clauses with ambiguous periods of time
- hasn't got a licence fee that is all inclusive

*Source: Licensing Digital Resources: How to avoid the legal pitfalls*

<http://www.eblida.org/ecup/docs/licensing.htm>

## **Library Position Statements**

EBLIDA Position on User Rights in Electronic Documents (1998)

<http://www.eblida.org/ecup/docs/policy21.htm>

ICOLC Statement of Current Perspective and Preferred Practices for the Selection and Purchase of Electronic Information (1998)

<http://www.library.yale.edu/consortia/statement.html>

IFLA Licensing Principles (2001)

<http://www.ifla.org/V/ebpb/copy.htm>

## **Model licences and resources**

eIFL.net model licences

[http://www.eifl.net/services/services\\_model.html](http://www.eifl.net/services/services_model.html)

eIFL.net resources for consortium building

[http://www.eifl.net/resources/resources\\_consoritium.html](http://www.eifl.net/resources/resources_consoritium.html)

Liblicense Standard Licensing Agreement

<http://www.library.yale.edu/~llicense/modlic.shtml>

UK JISC model licence

<http://www.jisc-collections.ac.uk>

Model standard licenses for use by publishers, librarians and subscription agents

<http://www.licensingmodels.com/>

## **TECHNOLOGICAL PROTECTION MEASURES – THE “TRIPLE LOCK”**

### **What is a technological protection measure (TPM)?**

A technological protection measure (TPM) is a means of controlling access to and use of digital content by technological means i.e. through hardware or software or a combination of both. A common use of TPMs is to prevent or restrict copying. A TPM can manifest itself in many ways e.g. a DVD player that won't play a DVD bought in another part of the world because of region coding, the inability to transfer legally purchased music to a third party MP3 device. Digital Rights Management (DRM) is often used interchangeably with TPMs, although there may be some differences in definitions. To its detractors, DRM is known as "Digital Restrictions Management<sup>i</sup>.

Librarians and other users began to take notice when TPMs acquired their own special legal protection in the 1996 WIPO Copyright Treaty (WCT). This means that there is an international treaty provision making it illegal to circumvent or break a TPM "used by authors in connection with the exercise of their rights"<sup>ii</sup>. Anti-circumvention provisions are being implemented into the national laws of countries that have signed the WCT. Amongst the first to do so was the US in its 1998 Digital Millennium Copyright Act (DMCA), followed by the 2001 European copyright Directive<sup>iii</sup>. Both implementations are generally regarded as strict interpretations of the WCT provisions. Circumvention is illegal, regardless of the purpose. In the US, circumventors are subject to civil and criminal penalties.

This means that right holders have been given a new tool with which to enforce their copyrights. Using technology, they can set the rules by which content is accessed and used, effectively bypassing copyright law and any provisions that may exist for the benefit of users e.g. exceptions and limitations. Together with the prevailing use of licences to govern access to digital content, and the propensity of licences to override copyright law, rights holders find themselves in a very powerful position in the digital world, placing users in a "triple lock". (See also The Relationship between Copyright and Contract Law: Electronic Resources and Library Consortia).

There is widespread concern amongst consumer advocates that while TPMs/DRMs are poor at preventing commercial copying, they are good at restricting consumer use, including normal expected uses such as format and time shifting. Consumer choice may be split into different pricing models with restricted functionality versus a wider choice. TPMs block assistive technologies used by people with disabilities. Lack of interoperability e.g. locking consumers into one platform, can lead to anti-competitive behaviour, price discrimination and market segmentation.

Concerns about privacy and security were realised in the now infamous "Sony rootkit" story which broke in November 2005<sup>iv</sup>. Sony BMG Music Entertainment distributed a copy-protection scheme with music CDs that secretly installed a rootkit (commonly used by malware) on their customers' computers. The software tool was run without the knowledge or consent of the computer owner and it created a major security flaw in the computer's operating system leaving it vulnerable to computer viruses. So great was the outcry, that Sony was forced to remove copy-protected CDs from shops in the run-up to the lucrative Christmas season. Not before an estimated half a million networks worldwide were infected, however, followed by a rash of class-action lawsuits in the US. For people with fast broadband internet access and the ability to download fixes easily to their computer, perhaps this was a major inconvenience. For a primary school in a developing country with no internet access, who is liable for the costs of fixing their broken computer in such situations?

## **Practice**

Legislators are aware that such powerful provisions may need to be checked in some way.

The US Register of Copyrights has the authority to make rules in response to proposals by affected parties. In the most recent ruling in December 2006, persons who engage in non-infringing uses of copyrighted works in six classes of works will not be subject to the statutory prohibition during the next three years. These include audio-visual works in a third-level educational library or media studies department and, to enable the Internet Archive to legally preserve software and video games, computer programs and video games on obsolete formats<sup>v</sup>.

The European legislator takes a different approach. The copyright Directive says that Member States must intervene to enable beneficiaries to avail of certain exceptions for TPM-protected content (e.g. the library exception<sup>vi</sup>) and has discretion to intervene for others (e.g. reproduction for private use<sup>vii</sup>). However, these safeguards do not apply to works subject to "click-wrap" contracts, effectively leaving the user at the mercy of the rights holder with regards to circumvention for online content. Otherwise, the Directive encourages right holders and users to reach voluntary agreements, a piecemeal solution that naturally favours the stronger party.

The US-based digital civil rights organisation, Electronic Frontier Foundation, documents how the anti-circumvention provisions of the DMCA have been used to stifle a wide array of legitimate activities, rather than to stop copyright infringements. It illustrates how they are being invoked against consumers, scientists, and legitimate competitors, rather than pirates<sup>viii</sup>.

## **Policy issues for libraries**

The success of the Information Society depends on digital content being accessible. The legal protection given to TPMs/DRMs creates a conflict with copyright exceptions. At a hearing of the UK All Parliamentary Internet Group in 2006, the British Library warned that TPMs might "fundamentally threaten the longstanding and accepted concepts of fair dealing and library privilege and undermine, or even prevent, legitimate public good access"<sup>ix</sup>.

Libraries have a number of concerns.

- Libraries must not be prevented from availing of their lawful rights under national copyright law. TPMs cannot distinguish between legitimate and infringing uses. The same copy-control mechanism which prevents a person from making infringing copies of a copyright work, may also prevent a student or a visually impaired person from making legitimate copies under fair use/fair dealing or a legal copyright exception.
- Long-term preservation and archiving, essential to preserving cultural identities and maintaining diversity of peoples, languages and cultures, must not be jeopardised by TPMs/DRMs. The average life of a DRM is said to be between three and five years. Obsolescent DRMs will distort the public record of the future, unless the library has a circumvention right.
- The public domain must be protected. DRMs do not cease to exist upon expiry of the copyright term, so content will remain locked away even when no rights subsist, thereby shrinking the public domain.

Libraries are strong opponents of anti-circumvention provisions that enable rights owners to override exceptions and limitations in copyright law. Libraries must be allowed to circumvent

a TPM/DRM to make a non-infringing use of a work.

### **Library position statements**

American Library Association, Libraries and Copyright in the Digital Age  
<http://www.ala.org/ala/washoff/WOissues/copyrightb/copyright.htm#LnC>

eIFL/IFLA Joint Statement WIPO SCCR/14, Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcast Organizations, May 2006  
[http://www.eifl.net/services/ipdocs/sccr\\_14\\_written.pdf](http://www.eifl.net/services/ipdocs/sccr_14_written.pdf)

IFLA Committee On Copyright And Other Legal Matters (CLM)  
Limitations And Exceptions...In The Digital Environment: An International Library Perspective  
<http://www.ifla.org/III/clm/p1/ilp.htm>

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Digital Restrictions Management <http://www.drm.info/>

Digital Rights Management: A failure in the developed world, a danger to the developing world, Cory Doctorow [http://www.eff.org/IP/DRM/drm\\_paper.php](http://www.eff.org/IP/DRM/drm_paper.php)

Electronic Frontier Foundation, Unintended Consequences: Seven Years under the DMCA April 2006 [http://www.eff.org/IP/DMCA/unintended\\_consequences.php](http://www.eff.org/IP/DMCA/unintended_consequences.php)

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[http://www.eifl.net/services/ipdocs/isipd\\_eifl.pdf](http://www.eifl.net/services/ipdocs/isipd_eifl.pdf)

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World Intellectual Property Organization Copyright Treaty (WCT) (1996)  
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## **COPYRIGHT, THE DURATION OF PROTECTION AND THE PUBLIC DOMAIN**

### **Copyright and the public domain**

Copyright gives legal protection to creators of “works of the mind” by granting an exclusive right to a creator to control production and use of the work by others. The creator has the right to control the reproduction (making copies), distribution of copies, public performance, broadcast and translation of their work. It covers literary, dramatic, musical or artistic works. To qualify for copyright protection, the work must be original and “fixed” in some tangible or material form e.g. written down or recorded.

In addition, a set of rights, known as related rights, subsist in sound recordings (for the person who undertakes the musical arrangements), in film and video (the film producer), in broadcasts and cable transmissions (the service provider), and in some countries in typographical arrangements of a published edition (the publisher).

Copyright is an economic property right, in other words, it is not a personal or human right. This means that copyright may be assigned or licensed to a third party e.g. an author may assign the copyright in a book they have written to a publisher in return for payment. The publisher then owns the copyright and controls the use of the book e.g. distribution and translation. Copyright can also be inherited by the heirs of a deceased author.

The purpose of copyright is to enable creators and entrepreneurs to receive financial reward for their works or for the works of others. This is an incentive to encourage further creativity and innovation and a thriving artistic and cultural environment which in turn benefits society. This purpose is borne out in the title of the world’s first copyright law, “An Act for the Encouragement of Learning” (1710), also known as the English Statute of Anne. The Statute of Anne also recognised another important principle; that the exclusive right given to creators should be limited in time (in this case, fourteen years from the date of first publication). After this time, the works were no longer protected by copyright and so fell into the public domain.

The public domain is considered to be part of the common cultural and intellectual heritage of humanity and can be a source of inspiration, imagination and discovery for creators. Works in the public domain are not subject to any restrictions and may be freely used without permission for commercial and non-commercial purposes. For example, a publisher can produce special low-cost editions of a book in the public domain, a songwriter can parody a well-known ballad without fear of being sued, a teacher can distribute copies of a poem for students in their class, a library can digitise a set of public domain photographs for their online local history exhibition.

### **The duration of copyright protection**

The duration, or term, of copyright protection has been extended many times since the Statute of Anne. The international legal standard, as set out in the Berne Convention (1886) which establishes the ground rules for national copyright protection, is now life of the author plus fifty years after the death of the author. This duration also applies in the more recent WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (1995), known as TRIPS.

There are exceptions to this basic rule for certain categories of works. For film, the term is 50 years after the work has been made available to the public, or if it has not made available, then 50 years after the making of the film. These terms also generally apply to anonymous works or where the author or rights owner is not a “natural person” e.g. an institution or a

publisher. For photographs and works of applied art, the term of protection is 25 years from the making of the work.

However, under Berne, it is possible for a country to exceed the term of life of the author plus fifty years, and for members of the WTO bound by the TRIPS agreement, life plus fifty years is a *minimum* standard to which all countries must adhere. The majority of countries in the world adhere to the rules under Berne i.e. life of the author plus fifty years post mortem, followed by a large minority who have chosen to extend the term of protection to life of the author plus seventy years post mortem.

### **Practice: extending the term of protection**

Life of the author plus fifty years after their death was considered in the Berne Convention and in TRIPS, both internationally negotiated treaties, to constitute a fair balance between the interests of authors and rights owners and the needs of society. It provided a monopoly right to most creators to benefit not only themselves during their lifetimes, but to benefit the heirs of their estate as well e.g. their children and grandchildren.

During the 1990's however, the term of protection was extended in many countries by a further twenty years i.e. to life of the author plus seventy years. This was accelerated by two of the world's two largest trading blocs, the European Union and the United States, who in the global economy both have influence beyond their shores. In 1993, the European Union (EU) "harmonised" the term of protection of copyright and related rights which meant that most EU member states were required to increase the term of protection to life of the author plus seventy years. In 1998, the Copyright Term Extension Act extended protection in the United States to match for general copyrights and to ninety-five years for works made for hire (related rights). As copyright came increasingly within the realm of trade agreements, and as trade agreements between the EU/US and third countries typically required the longer term, the dye was cast for many other countries around the world. (For more information, see Copyright and Trade Agreements).

Observers from many quarters think that life plus seventy years is excessive and that the original purpose of copyright, to provide an incentive to creators, has been lost sight of. One notable feature of the current policy-making environment is the presence of big business and the influence of the "copyright industry" on global and national copyright laws. In fact, the US Copyright Term Extension Act (1998) became known as the "Mickey Mouse Protection Act" while opponents, who launched a challenge to the Act in the US Supreme Court, adopted "Free the Mouse" as an unofficial slogan. The copyrights on Mickey Mouse, Donald Duck and their other Disney world-character friends were due to run out in the following years and they would have entered the public domain. The Walt Disney Company, ironically built on adaptations of public domain works such as Snow White, threw their weight behind the extension to protect their profitable business interests for another two decades. The result affected tens of thousands of works of all kinds which were poised to enter the public domain in the US, but instead remained under private ownership until at least 2019.

In the US, the extension was retroactive for all works still under copyright. In Europe, the extension was retroactive not only for works still in copyright, but also for works that had passed into the public domain within the previous twenty years. In other words, some works in the public domain were re-protected, representing a windfall for the estates of deceased creators. This led to a number of European court cases such as the dispute between a music publisher and a publicly funded theatre over performance rights in the Puccini masterpiece opera *La Bohème*<sup>1</sup>, and famously, an emergency amendment to the Irish copyright act to

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<sup>1</sup> Hessen v G Ricordi & Co Buhnen- und Musikverlag GmbH (C360/00), 2002 WL 30004, Celex No. 600C0360, EU: Case C-360/00, ECJ, Feb 28, 2002

ensure that "Rejoyce Dublin 2004", a festival to celebrate the centenary of Bloomsday, the day on which James Joyce's novel Ulysses was set, could go ahead as planned. Copyright in the works of James Joyce published during his lifetime had expired in 1991, fifty years after his death. For three and a half years, they were in the public domain. As a result of the 1993 European legislation, copyright was revived until 2011, leading one to ask how this can be an incentive for James Joyce, deceased since 1941, to create new works.

### **Policy issues for libraries**

Libraries have long been concerned about the erosion of the public domain, which provides a fertile source of content upon which creators can build new works, as well as enabling libraries to provide public access to the world's great artistic and literary masterpieces e.g. through digitisation projects. However, the public domain must be nurtured and protected from encroachment. As custodians of the world's cultural and scientific heritage, librarians should be advocates for the public interest, should educate users on the value of the public domain and provide leadership to policy makers. This includes advising on the hidden costs to libraries of copyright protection such as extra fees for licensing and document supply, book and journal prices, equipment levies and the time consuming and frustrating process of copyright clearance, as well as the benefits of a rich public domain for education and society to flourish.

For developing and transition countries, where the issue of accessing information is a key determinant in their development, term extensions mean that information that traditionally belonged to everybody is removed from collective ownership with grave consequences for education and innovation. Furthermore, the extension of the term disproportionately benefits rights owners and their estates in developed nations, at the expense of users of information and potential new creators in developing countries, reflecting the information flows from North to South.

*"A rich public domain and fair access to copyright protected material enhances creativity and the production of new works. It is often assumed that economic growth benefits from ever-stronger intellectual property rights while some concession must be made to copyright exceptions for purely social reasons. In fact this is a false dichotomy. Many industries require access to copyright material for the purposes of research and development, education, software or hardware interoperability. A lack of reasonable access can actually hurt economic growth."* IFLA Committee on Copyright and other Legal Matters  
<http://www.ifla.org/III/clm/p1/ilp.htm>

### **Library position statements**

Importance of the Public Domain, Special Libraries Association (SLA)  
Information Outlook, Vol. 5, No. 7, July 2001  
<http://www.sla.org/content/Shop/Information/infoonline/2001/jul01/copyright.cfm>

Joint statement by IFLA and Electronic Information for Libraries (eIFL.net) on the proposal by Chile for WIPO to undertake an appraisal of the public domain (2006)  
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Proposal by Chile to WIPO on the public domain (2006)  
[http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=55592](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=55592)

Limitations and Exceptions to Copyright and Neighbouring Rights in the Digital Environment: An International Library Perspective (2002) IFLA Committee on Copyright and other Legal Matters <http://www.ifla.org/III/clm/p1/ilp.htm>

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<http://www.wipo.int/treaties/en/ip/berne/>

US Copyright Term Extension Act  
<http://www.copyright.gov/legislation/s505.pdf>

European Council Directive 93/98/EEC harmonising the term of protection of copyright and certain related rights  
European Commission Official Journal L 290, 24/11/1993 P. 0009 – 0013  
[http://ec.europa.eu/internal\\_market/copyright/term-protection/term-protection\\_en.htm](http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm)

### Articles

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*Note: sources listing the term of protection in different countries may not always be complete or accurate*

## **COPYRIGHT EXCEPTIONS AND LIMITATIONS**

### **What are copyright exceptions and limitations?**

The original purpose of copyright law is to encourage creativity and innovation. It aims to do this in two ways. On the one hand, it grants legal protection so that authors and creators can exploit their works, for example, get financial reward for their work. On the other hand, it provides reasonable access to society to encourage innovation, research and further creativity. So from the beginning, copyright law was meant to balance the need to protect creators with the user's need to access information and knowledge goods.

The legal protection granted to the creator is in the form of an exclusive right to control production and use of the work by others, for example, copying, distribution, translation, public performance and broadcasting. This is a powerful, monopoly right. In order to provide reasonable access to society, the exclusive rights are limited in two main ways.

- The right is granted for a limited amount of time only, known as the term of protection. The international standard term of protection for a literary work is the life of the author plus 50 years after death. (See also eIFL Handbook chapter Copyright, the Duration of Protection and the Public Domain).
- The rights granted are subject to certain exceptions and limitations to enable access to copyrighted works.

Exceptions and limitations can be considered in three broad categories. The first category safeguards fundamental user rights concerning the individual. Examples include public speeches, the right to make quotations, the reporting of current events, the right to parody, and reproductions for private non-commercial use. The second category reflects commercial interest, industry practice and competition. This includes press reviews, and de-compilation/reverse engineering of computer programs for interoperability. The third category concerns society at large and promotes the dissemination of knowledge and information. It includes provisions for libraries, educators for teaching and research, people with disabilities, and reporting of parliamentary and judicial proceedings.

Exceptions and limitations can be either compensated or uncompensated. Compensated exceptions mean that the copyright owner is usually entitled to a payment when the exception is used. In other words, the user does not need to ask for permission, but the rightowner is remunerated for the use (so it is a bit like compulsory licence). Uncompensated exceptions mean that the copyright owner is not compensated when the exception is exercised. Compensated and non-compensated uses are discussed in **Kenneth Crews, WIPO study on copyright limitations and exceptions for libraries and archives, p.38.**

In addition, some countries have an "all-purpose" general provision. In the US, this is known as the doctrine of "fair use". Codified in US copyright law, it is subject to four criteria and has evolved through court decisions over the years. The UK has a related concept known as "fair dealing", which takes a narrow, specific approach and covers mainly research and private study, criticism and review, and news reporting. The precise definition and interpretation of fair dealing is ultimately determined by the courts. Countries that inherited British copyright law are likely to have the fair dealing provision.

## **Copyright exceptions and the international legal framework**

The international copyright system has from the earliest days recognised exceptions and limitations to copyright, which are considered an essential part of a well-functioning copyright system. Accordingly, the Berne Convention for the Protection of Literary and Artistic Works (1886) contains several exceptions and permits signatories to devise further limitations in accordance with national legislation. This includes a mandatory, uncompensated exception for the quotation of copyrighted works compatible with "fair practice" (Article 10(1)), and gives discretion to member states to create uncompensated exceptions and limitations for a range of uses such as news reporting, illustration and recording musical works, subject to certain conditions.

The Berne Appendix (1971) also contains special provisions for developing countries and places limitations on the right of translation and the right of reproduction, subject to strict conditions. (Due to the complex procedures and limited scope, the Berne Appendix has turned out to be of limited benefit to developing countries).

The Berne Convention further allows the creation of additional uncompensated exceptions to the right of reproduction provided they meet the controversial three-step test (Article 9(2)) that was carried forward and extended in TRIPS (Article 13). The scope and application of the three-step test is subject to debate by legal scholars and law-makers. In any case, the three-step test is a mere drafting tool for the legislator and, once applied, should not be included in national law.

## **Exceptions and limitations for digital content**

The 1996 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, known collectively as the "Internet treaties", updated international copyright law for the digital environment. Both treaties contain important statements regarding exceptions and limitations in the digital environment. In the Preambles, the need to maintain a balance between the rights of rightholders and the larger public interest, particularly education, research and access to information, is recognised.

An agreed statement reaffirms that signatories can carry forward and extend into the digital environment exceptions and limitations in their national laws, and that they may devise new exceptions and limitations that are appropriate in the digital network environment (WCT Agreed Statement to Article 10, WPPT Agreed Statement to Article 16).

## **Practice**

Except for Article 10(1) of the Berne Convention (see above), exceptions and limitations are discretionary and are left for national governments to decide. This provides countries with flexibility to create access regimes that meet national educational cultural and development needs. However, evidence shows that these flexibilities are often not transposed into national law for the benefit of the public and has led to a patchwork of national exceptions that often do not meet the needs of the global digital environment. Two WIPO commissioned studies, Copyright Limitations and Exceptions for Libraries and Archives (Crews, 2008) and Copyright Limitations and Exceptions for the Visually Impaired (Sullivan, 2007), confirm this trend particularly in relation to developing countries. A study by Consumers International (2006) found that none of the eleven developing countries surveyed in the Asia Pacific region had implemented all the flexibilities available to them under international treaties.

In addition, new treaties over the years have introduced new exclusive rights, new subject matter and new modes of exploitation. Exceptions and limitations have not evolved at the

same pace as the development of authors' and other rightsholders' rights, seriously upsetting the copyright balance. Private licensing of electronic materials in libraries frequently undermine the exceptions and limitations, and the application of technological protection measures can prevent their use. (See also eIFL Handbook chapters The Relationship between Copyright and Contract Law and Technological Protection Measures).

## Policy issues for libraries

Exceptions and limitations are the cornerstone of access to copyrighted content. Without them, copyright owners would have a complete monopoly over use of copyrighted materials. Works in copyright could only be sold and lent. Libraries, and the people using them, could only view or read copyrighted materials. All other uses would require permission. This would threaten the functioning of libraries and interfere with the free flow of information. Thus, libraries cherish the public policy goals enshrined in the principle of exceptions and limitations, and insist on their continued applicability in the digital age.

The agreed statement to Article 10 of the WIPO Copyright Treaty (see above) was an attempt to provide a remedy for such future issues. More than a decade on, the issues are too complex to be addressed solely by this general statement expressing an intention. This is why libraries, other user groups and some legal academics have been calling for a minimum set of exceptions and limitations, for example, as part of an international treaty on Access to Knowledge. The WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives concluded that there is a demand amongst librarians for more supportive legislation and clearer laws that would apply to the services they deliver.

Since 2004, eIFL.net, IFLA and latterly the US Library Copyright Alliance (LCA) have been raising these issues at WIPO and supporting the position of member states including Chile, Brazil, Nicaragua and Uruguay. In November 2008, the WIPO Standing Committee on Copyright and Related Rights (SCCR) began discussing exceptions and limitations for blind, visually impaired and other reading disabled people, as well as libraries and education.

In May 2009, eIFL.net, IFLA and LCA published a joint *Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives* which sets out minimum, core library copyright exceptions for the 21<sup>st</sup> century. This document is the basis for future discussion and action by the international library community. The principles are:

- **Preservation:** A library should be permitted to make copies of published and unpublished works in its collections for purposes of preservation, including migrating content to different formats.
- **Legal deposit:** Legal deposit laws and systems should be broadened to include works published in all formats and to allow for preservation of those works.
- **Interlibrary loan and document supply:** Libraries should be able to supply documents to the user directly or through the intermediary library irrespective of the format and the means of communication.
- **Education and classroom teaching:** It should be permissible for works that have been lawfully acquired by a library or other educational institution to be made available in support of classroom teaching or distance education in a manner that does not unreasonably prejudice the rights holder. A library or educational institution should be permitted to make copies of a work in support of classroom teaching.
- **Reproduction for research or private purposes:** Copying individual items for or by individual users should be permitted for research and study and for other private

purposes.

- **Provision for persons with disabilities:** A library should be permitted to convert material from one format to another to make it accessible to persons with disabilities. The exception should apply to all formats to accommodate user needs and technological advances. To avoid costly duplication of alternative format production, cross-border transfer should be permitted.
- **General free use exceptions applicable to libraries:** A general free use exception consistent with fair practice helps ensure the effective delivery of library services.
- **Orphan works:** An exception is needed to resolve the problem of orphan works, where the rights holder cannot be identified or located.
- **Copyright term:** Consistent with the Berne Convention, the term of copyright for literary works should not exceed the life of the author plus 50 years.
- **Technological protection measures that prevent lawful uses:** It should be permissible for libraries and their users to circumvent a technological protection measure for the purpose of making a non-infringing use of a work. Implementation of anti-circumvention legislation in many nations exceeds the requirements of Article 11 of the WIPO Copyright Treaty, effectively eliminating existing exceptions in copyright law.
- **Contracts and statutory exceptions:** Contracts should not be permitted to override exceptions and limitations. The goals and policies providing for exceptions are important statements of national and international principle and should not be varied by contract.
- **Limitation on liability:** There should be a limitation on liability for libraries and library staff who act in good faith, believing or having reasonable grounds to believe, that they have acted in accordance with copyright law.

## Library position statements

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## **LEGAL DEPOSIT**

“Legal deposit” is a legal obligation that requires publishers to deposit a copy (or copies) of their publications within a specified period of time in a designated national institution. The institution is usually a library, and usually includes the National Library. According to the British Library, the principle that a national printed archive should be maintained by a legal requirement to deposit has been well established for almost four centuries. Legal deposit does not usually apply to unpublished works or original works of art, and increasingly includes published audiovisual and electronic materials and the harvesting of websites.

Legal deposit helps to ensure that the published record of human memory, creativity and discovery are acquired by the nation so that it can be preserved and made available to future generations. Authors and publishers benefit because deposited works become part of the national collection and are preserved at public expense, as far as possible, in perpetuity. Such collections are a valuable resource to publishers themselves for accessing their own historical output in later years, as current preservation techniques and finding aids are applied to the deposited materials under the professional care of the deposit library.

According to the **IFLA Guidelines for Legal Deposit Legislation**, most countries rely on a legal instrument of some sort in order to ensure the comprehensiveness of their national deposit collection. The statutory powers for legal deposit are typically the subject of a separate Act or they may be included in copyright or library legislation. The Netherlands has taken a different approach, where a national deposit collection has been built through voluntary deposit agreements between the Royal Library and publishers.

### **Practice**

A “publisher” is someone who issues or distributes publications to the public. Thus, works published or distributed within a country or perhaps a region, are normally subject to deposit. Traditionally legal deposit was of printed materials including books, both hardback and paperback (including all editions and revisions but not usually straight re-prints), periodicals e.g. journals, magazines, newsletters, annual reports, all editions of daily and weekly newspapers, sheet music, maps, plans, charts, tables, catalogues, brochures and pamphlets. Usually best quality copies must be provided. Generally speaking, materials such as internal reports, local transport timetables, appointment diaries and calendars, posters and examination papers are excluded, but the deposit library may have the option to require deposit of specific items. Deposited materials are usually made available to library users on-site in library reading rooms.

Deposited materials may also be listed in the National Bibliography and the deposit library's online catalogue, the basic tools used by researchers to identify and locate works. The National Bibliography is also used by librarians and the book trade to select materials for purchase, not only in the country concerned but around the world.

### **Legal deposit of audiovisual and electronic works**

Works of all kinds are fast migrating to electronic formats, both offline and online. Printed works as well as new sound recordings and film are becoming digital. Electronic materials are beginning to dominate the world's published output particularly in research publishing; the British Library estimates that “by the year 2020, 40% of UK research monographs will be available in electronic format only, while a further 50% will be produced in both print and digital. A mere 10% of new titles will be available in print alone by 2020”. Therefore, if the world's digital cultural heritage in the 21<sup>st</sup> century is to be preserved, countries must

legislate to include electronic works in legal deposit collections.

In some countries, materials in offline electronic formats such as CD, DVD and computer disks (e.g. audiovisual materials such as audio-books, other sound recordings and film, and computer programs on CD) are included in legal deposit schemes, but this is by no means universal.

Detailed information about legal deposit of digital publications relating to 20 countries and the general worldwide progress on legal deposit of electronic works can be found on the Legal Deposit pages of **Australian National Library PADI (Preserving Access to Digital Information)** website (accessed October 2009):

- Countries with legislation for the deposit of offline but not online electronic works: Austria (drafting legislation for online works), Japan (voluntary deposit scheme for online works), and Singapore (voluntary deposit scheme for online works).
- Countries with legislation for the deposit of both offline and online electronic works, or with legislation in hand (in some countries legislation may be passed but not yet implemented, though voluntary schemes may be functioning): Canada, Denmark, Finland, France, Germany, Iceland, New Zealand, Norway, South Africa, Sweden (harvesting Swedish sector of the internet), United Kingdom.

## **Policy issues for libraries**

The biggest challenge facing libraries concerns the **legal deposit of digital materials**. The 2001 UNESCO General Conference resolution on the preservation of digital heritage encouraged Member States to introduce statutory legal deposit of electronic materials. Almost a decade later, legal deposit is not keeping up with the transfer of information from print to digital formats. Some countries have not begun to address the issue, while in others, even those with well-developed information infrastructures, progress is slow. Meanwhile, valuable online materials are being lost to the national collections and future researchers. Following in its tradition of voluntary deposit for printed materials, the Royal Library of the Netherlands has negotiated voluntary deposit agreements for online publications with the major global scientific, technical and medical (STM) publishers.

Legal deposit for electronic materials is an important tool in the **preservation** of e-journals, e-books, sound recordings and film, echoing the philosophy that "Lots of Copies Keep Stuff Safe" (known as LOCKSS). It is important therefore that statutory exceptions for copying for preservation allow libraries to make as many copies in as many different formats as necessary, in order to migrate to current platforms and media to ensure continued access to the collections into the future.

**Technological protection measures (TPMs)** can prevent libraries from copying or undertaking other legitimate activities. "Clean" versions of electronic materials should therefore be deposited, or the library should be provided with the means to circumvent the TPM. In Germany, the National Library reached a voluntary agreement with publishers to allow it to circumvent TPMs. In Norway, the National Library obtained a statutory exception with limited powers to enable the Library to circumvent for preservation purposes.

Another issue is the level of **public access to electronic works in copyright** before the works enter the public domain. Usually, the public can access the national internet archive only on-site at the deposit library, or on a secure network to other branches. If in-copyright deposited electronic works are to be made available to the public remotely over a network, permission is usually required from rightholders. Additionally, some deposit libraries may

also allow researchers remote access to copyright materials in the archive that are not commercially available.

The development of national collections is traditionally governed by **geographic boundaries**. For websites and material on the internet, it can be more difficult to determine which materials are appropriate for legal deposit and in particular, which websites should be harvested. Both voluntary and statutory schemes are being developed to create national web archives of national domain, national language and other websites with content relevant to that country. **Data protection** obligations in national laws for the processing of personal data (data that relates to living identifiable persons such as health and other personal information) should be taken into account, since it cannot be assumed that harvested websites are necessarily compliant.

With national collection development policies adapted to the electronic era, libraries should work with policy-makers and rightholders to ensure that there are adequate legal provisions to develop a robust national deposit collection of electronic works, that can be made available to the public and future generations of researchers on reasonable terms.

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October 2009

## ORPHAN WORKS

### What are orphan works?

An “orphan work” is a work protected by copyright, but where the current owner of the copyright cannot be found. It can be both difficult and costly to trace the rightowners of orphan works because:

- The author may be unknown, or may be deceased leaving no locatable heirs; the date of death may be unknown.
- Where a company holds the rights or information about rightholders, it may have ceased trading with no legal successor or may have merged with another company; the old records may be lost.
- The work may include within it other works (e.g. photographs) with their own separate rights, one or more of which may be orphaned.

The main reason why a library usually needs to contact the copyright holder is in order to obtain permission to use the work in ways not covered by national copyright exceptions. A significant part of our cultural and scientific heritage is said to be orphaned. The BBC (British Broadcasting Corporation) estimates that it has one million hours of programmes in its archives presenting enormous complexities for rights clearances, and the British Library thinks that approximately 40% of its collections are orphaned. The Nordic countries, the UK government, the European Commission and the U.S. Copyright Office have all recognised that it is not in the public interest for such works to be withheld from the public due to the inability to clear the rights because the owners are unlocatable.

The problem affects libraries, archives and museums, authors and other creators of new or derivative works, publishers and the producers of sound recordings, films and broadcasts. This is especially true for preservation and digitisation projects, new publications about historical subjects and audiovisual works. Already the bane of the film and broadcasting industries, the problem of orphan works now impedes many library and archive mass digitisation projects. Meanwhile, the number of orphan works is on the increase, especially for online work, where material is posted on websites without metadata identifying the rightholder or without information on how to contact the responsible person.

### Practice

#### Why have orphan works become a problem?

The Berne Convention (1886 amended 1971) **prohibits any formalities** for the “enjoyment and exercise” of copyright. Copyright automatically accrues from the moment the work is “fixed” in a tangible or material form and the rightholder is not required to register copyright or to formally notify any authority. The burden of finding the rightholder therefore lies entirely with the user of the material. With no systematic or centralised way of checking ownership, finding a rightholder can prove impossible, especially if they are located overseas. This is a significant deterrent to making orphan works available to the public online and to incorporating them into new works.

Each time the **term of copyright protection is extended**, the difficulties in locating rightholders and obtaining clearance for older works increase. In other words, the fewer works there are in the public domain, the more works that may require permission. Under Berne, an author holds copyright for life plus 50 years after death. For example, the estate of an author whose memoirs on World War I were published in 1920, and who died in 1970 aged

75, would enjoy copyright in the work until 2020. If a library had wished to digitise a poem from the work in 2006 for an exhibition on the 90<sup>th</sup> anniversary of the Battle of the Somme, it would have needed permission from his estate. For European countries, which *retrospectively* extended the term of protection to life plus 70 years after death, this work remains in copyright for 120 years after the book was written, until 2040. Unless the author is very famous, the chances of locating his heirs or estate administrator for use at the centenary in 2016, are clearly diminished. The library must decide whether to take the risk or to abandon the use of the poem in the exhibition.

Extension of copyright term becomes critical in countries where exceptions for preservation copying exclude audiovisual media, hampering the preservation of fragile, older films or sound recordings. Where transfer to another medium is essential for the survival of these materials, libraries may risk infringing copyright.

The problem of orphan works does not lie solely with older works, but occurs in contemporary digital material as well. The wealth of new creative content available online can remain out of reach for re-use by others, unless care is taken to include rights information.

### **What level of search should be undertaken?**

The level of the search undertaken to locate the rightholder is a controversial area e.g. librarians argue that "sampling" is the appropriate search level for mass digitisation projects. The only formal guidance that exists thus far are the **Europeana Diligent Search Guidelines** developed for the European Commission's *Europeana* digital library project. These voluntary guidelines can be adapted on a case-by-case basis and may be useful for ad hoc or small-scale searches, but they have been criticised as being too cumbersome for use in mass digitisation projects.

There are few comprehensive online sources of information to help find missing rightholders. A good place to start is the **WATCH** database and its sister database **FOB**. Other developing resources are the European Commission funded **ARROW project** and the **MILE Orphan Works Database**. The proposed **Google Book Search Rights Registry** (see below) may in time be another source. Useful advice on searching for rightholders can be found on the **Columbia University's Copyright Advisory Office** website.

### **Some possible solutions**

#### Rights information metadata on the web

Initiatives such as **Creative Commons** (see the chapter on *Creative Commons: an "open content" licence*) whereby creators can license their online work for specified uses, include rights information metadata. Some mainstream publishers are using ACAP (Automated Content Access Protocol), a non-proprietary, global permissions tool. These initiatives may alleviate the situation, but do not address the underlying problem.

#### **Legislative solutions**

##### European Union

The High Level Expert Group (HLEG) of the European Commission Digital Libraries Initiative showed that there is a "black hole" of 20<sup>th</sup> century orphan or out-of-print works in the Commission's flagship *Europeana* project. The Commission is funding projects such as ARROW and MILE to provide tools to help identify or locate missing rightholders. It has brokered a model licence for out-of-print copyright works and voluntary *Diligent Search Guidelines*

backed by a *Memorandum of Understanding* (MOU). However, the *Guidelines* have no force in law and cannot indemnify the user, so libraries, archives and museums remain vulnerable to prosecution even if the risk is perceived to be low. Therefore at the request of library groups, the MOU contains a commitment that the Commission will seek legislative solutions. Orphan works were included in the Commission's *Green Paper on Copyright and the Knowledge Economy* (2008), and there is speculation that the Commission may eventually direct all Member States to legislate at national level and to require them to recognise each other's schemes.

### United States

The U.S. Copyright Office report on orphan works (2006) recommended that potential publishers of orphan works should first conduct a "reasonably diligent search" to locate the owners. Should the rightowners later appear and demand payment for the use, they are entitled to "reasonable compensation", but not compensation for infringement of copyright. The U.S. approach has a major drawback however, because it does not remove liability for infringement even if the threat of damages may be removed. Instead it merely restricts the compensation that would be paid to rightholders to reasonable levels. Additionally, diligent search may not be practical for mass digitisation projects, other than on a sampling basis. None of the various congressional Bills to implement the recommendations have so far made progress. For information on American orphan works legislation, see the American Library Association's Orphan Works pages.

An eventual agreement on the terms of the **Google Book Settlement** (GBS) will likely have great significance for orphan works because of the size and comprehensiveness of the works included in the Google Books digital library. The proposed **Books Rights Registry (BRR)** would in effect become a "trustee" for the orphan works in the database, giving it a huge controlling monopoly. On the other hand, the BRR would be a significant resource for tracing rightowners and clearing rights. See American Library Association web pages on the GBS for more information.

### Canada

The Copyright Board of Canada grants non-exclusive licences for the use of published works when the copyright owner is identified but cannot be located. To obtain a licence, an application form describing the efforts made to locate the rightowner must be completed. If the Board determines that "reasonable efforts" have been made, it sets terms and fees for the proposed use. If the copyright owner does not appear within five years, the fees are paid to the relevant collecting society. The Canadian system does not deal with situations where rightowners remain unidentified. Since the system was introduced in 1990, only 125 licences have been issued; anecdotal evidence suggests that applicants find the process cumbersome and slow and that it does not meet their needs.

### Nordic countries

Some Nordic countries have a system of **extended collective licensing schemes mandated by law**. Extended collective licensing means that licensing schemes for orphan works are available through collecting societies that provide the licensees e.g. libraries, with indemnity from prosecution and other legal penalties, making it safe to use the works. The collecting societies are themselves indemnified by the State which allows them by law to represent their class of rightholders, whether or not the individual rightholder is an actual member of the society or has mandated the society to act on their behalf. Such schemes may also include provisions for unclaimed monies paid in licence fees to be put towards grants for the social benefit of authors and creators. For information about the concept of extended

collective licensing, from the rightholder viewpoint, see the website of Kopinor, a Norwegian collecting society.

### United Kingdom

The UK has a very limited statutory provision that covers only a small sub-set of orphan works i.e. works that are at least 100 years old, that might still be in copyright and have unknown or unlocatable rightowners. Like the Canadian law, it does not provide guidance as to what constitutes a "reasonable" inquiry.

In 2009, the UK government announced plans to introduce an enabling clause for orphan works in the Digital Economy Bill (due autumn 2009). This will allow for subsequent secondary legislation which it would seem, may enable collecting societies to offer statutory extended collective licensing based on the Nordic model referred to above. Such legislation would not be in place before 2011.

### **Policy issues for libraries**

The orphan works problem undermines the principal role of libraries in preserving cultural heritage and making it accessible through the digitisation of their collections. This is because the inclusion of orphan works often entails expensive, time-consuming enquiries to find the rightholder, that may turn out to be fruitless.

In some countries, libraries have a statutory right to copy works in their holdings for preservation purposes, including rights to digitise, but they may still need to obtain permission to provide remote access. This means that the library could spend time and effort on expensive digitisation projects in order to produce a type of "dark archive" that can only be accessed by a limited group of users.

Libraries and archives tend to be risk averse and may not have access to legal advice. Even where orphan works provide significant resources for scholarship, they may be excluded because the library cannot risk litigation. This results in gaps in digital collections.

Orphan works are an issue for publishers, broadcasters, sound recording and film producers, as well as libraries. Collecting societies are interested in encouraging extended collective licensing solutions, which brings them new business. This means that there is common ground that can bring these groups together with libraries, archives and museums to advocate for change. Libraries should consider the merits of the different approaches e.g. a copyright exception, an extended collective licensing scheme, or a dual economy approach. They need to identify which models will meet their needs in their national environments and should take steps now, together with other stakeholders and legislators, to find workable solutions preferably backed by law.

### **Library position statements**

Association of Research Libraries

<http://www.arl.org/pp/ppcopyright/orphan/index.shtml>

<http://www.arl.org/pp/ppcopyright/orphan/orphanresources.shtml>

American Library Association Google Book Search Settlement <http://wo.ala.org/gbs/>

Orphan works <http://wo.ala.org/gbs/>

<http://www.ala.org/ala/aboutala/offices/wo/woissues/copyright/federallegislation/orphanworks/orphanworks.cfm>

IFLA/IPA joint statement on orphan works. June 2007

<http://www.ifla.org/en/statements/joint-iflaipa-statement-on-access-to-orphan-works>

IFLA/IPA joint statement on orphan works and mass digitisation (2007)

<http://archive.ifla.org/VI/4/admin/ifla-ipaOrphanWorksJune2007.pdf>

Orphan works and mass digitisation. British Library, 2008. <http://www.bl.uk/ip/> (scroll down)

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<http://www.arrow-net.eu/>

Center for the Study of the Public Domain, Duke Law School  
<http://www.law.duke.edu/cspd/orphanworks.html>

Columbia University's Copyright Advisory Office <http://copyright.columbia.edu/permissions>

Copyright Board Canada - Unlocatable Copyright Owners <http://www.cb-cda.gc.ca/unlocatable-introuvables/index-e.html>

European Commission Digital Libraries Initiative High level Expert Group  
[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/experts/hleg/meetings/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/meetings/index_en.htm) (scroll down to *5th meeting - 4 June 2008*):

- Press Release
- Final report on Orphan Works and Out-of-Print Works and Annexes 1-7
- Memorandum of Understanding on Orphan Works
- Sector-specific guidelines on diligence search criteria for orphan works - Joint Report & Appendix to the Joint Report - Sector Reports

FOB (Firms Out of Business) [www.fob-file.com](http://www.fob-file.com)

Google Books Settlement <http://books.google.com/googlebooks/agreement/>

Kopinor. Extended Collective License - the Nordic Solution  
<http://www.kopinor.org/oppavsrett/avtalelisens>

MILE (Metadata Image Library Exploitation) Orphan Works Database  
<http://orphanworks.ssl.co.uk/>

UK Intellectual Property Office  
<http://www.ipo.gov.uk/c-policy-orphanworks>  
[http://www.ipo.gov.uk/ipo\\_c-orphanworks\\_paper0809.pdf](http://www.ipo.gov.uk/ipo_c-orphanworks_paper0809.pdf)

U.S. Copyright Office  
<http://www.copyright.gov/orphan/>  
<http://www.copyright.gov/orphan/orphan-report.pdf>

The WATCH File (Writers and Artists and Their Copyright Holders) <http://tyler.hrc.utexas.edu/>

*Revised October 2009*

## **Collective Rights Management**

### **What is Collective Rights Management?**

Under copyright law, authors, performing artists, photographers and other rights owners have the exclusive right to authorise the use of their work. They may transfer the administration of their rights to organisations known as "collecting societies" or "collectives", to manage their rights on their behalf. They may do this by a voluntary agreement or by statutory regulation. In effect, the rights are channelled through the collecting society, aiming to reach the end-user more efficiently than by contacting individual rights holders.

There are different collecting societies for different rights. In general, performing rights collectives provide licences to play lyrics in live and recorded music in public places such as radio and TV stations, restaurants and shops. Playing music in a public place, such as a bar, also requires a licence from a phonographic performance collective on behalf of the rights holder, usually record companies, for sound recordings. Collectives for "mechanical copyright" license the recording of music onto different formats, such as cover versions of songs that have already been released, sound tracks for wedding and home videos. Artist and designer collectives license the works of cartoonists, architects, animators and others. In addition, there may be collecting societies for specialist areas such as Christian music, TV and radio broadcasts for educational use, etc.

In general, the role of the collecting society is to:

- license the use of protected works to users *when this is not otherwise permitted by the law* e.g. individuals, libraries, broadcasting organisations, photocopying agencies, etc.;
- collect royalties and distribute the monies to their members, the rights owners;
- enforce the rights of their rights owners;
- establish reciprocal agreements with collecting societies in other countries to enable cross-border licensing.

No two collecting societies are exactly alike. They can vary in the legal framework by which they are established, in structure and operation, in the rights that they grant. Some collectives don't license at all. Instead, they collect revenue from the sale of copying devices such as photocopy & fax machines and computer hard disks, known as a "machine levy". Collecting societies are usually not-for-profit organisations and are owned by their members, the rights holders, whom they represent.

### Reproduction rights organisations (RROs)

Libraries may need to acquire licences from any of the above collectives during the course of their work. However, the collective that the library will usually have the most dealings with is a reproduction rights organisation (RRO). An RRO typically licenses photocopying for books, journals and other material in the print and publishing sectors, and may also license for digital copying.

An RRO, like other collectives, is an intermediary between rights owners and users. Rights owners such as authors and publishers mandate the RRO to administer their reprographic reproduction (photocopying) rights on their behalf. The collecting society may then issue licences to individuals and institutions for certain uses of the copyrighted material. The RRO collects the licensing fees, deducts administration costs and passes the remainder as royalties to the rights owners. There are RROs in approximately fifty-five countries in Europe, Asia/Pacific, Latin America and the Caribbean, and Africa. Many RROs negotiate bi-lateral

agreements with each other so that they may license works from each other and pass the royalties to the “sister” RRO in the other country e.g. fees for photocopying from an American work under licence in a South African university will be paid to the American collecting society<sup>x</sup>.

## **Practice**

There are usually three main types of licences on offer. Some licences are non-negotiable with standard price lists based on the size and type of organisation and the extent of the copying. Licences for whole sectors, such as higher education, can usually be negotiated.

*Individual licence.* This is a licence that relates to a specific work used by an individual in a certain way, in other words, a one-off situation. For instance, a library may want to digitise an article from a print journal for an online student reading list.

*Blanket licence.* A blanket licence comprises works by all the rights owners in a certain category. For instance, a broadcasting company may obtain permission to use a certain genre of music for a specified period e.g. rock ‘n’ roll for a 1960’s music celebration.

*Legal licence.* In some countries, a licence to copy is given by law and the rights holder is entitled to a payment, which is collected by the RRO. In this case, no consent from the rights holder is required. If the royalty rate is set down in the law, this is called a “statutory licence”. If rights holders can negotiate the royalty rate with users, this is known as a “compulsory licence”.

*Extended collective licence.* Normally a collecting society can only enter into licence agreements on behalf of the rights owners who are members of the collecting society. An extended collective licence extends the effects of a copyright licence to also cover rights holders that are not represented by the collecting society. This provides users with security to legally copy materials without the threat of individual claims from rights holders who are not members of the collective from which they have the licence. Adopted originally by the Nordic countries, it is now used in a small number of other countries.

Over time, the role of collecting societies has evolved to include compliance and enforcement of copyright. For example, the Copywatch campaign of the UK Copyright Licensing Agency entices members of the public to report unlicensed copying with rewards of up to €30k (\$40k)<sup>xi</sup>. The International Federation of Reproduction Rights Organisations (IFRRO) has a co-operation agreement with the World Intellectual Property Organization (WIPO) to “promote the protection of intellectual property rights throughout the world”<sup>xii</sup> and includes worldwide seminars and training programmes.

## **Policy issues for libraries**

For users, such as libraries and educational institutions, collecting societies can offer a number of benefits:

- they enable users to legally undertake copying, which *is otherwise not permitted by the law*. In other words, they allow libraries and their users to copy more than is provided for by statutory exceptions (for a fee, of course);
- they ease the burden of rights clearance for libraries, who do not have to contact individual rights holders to acquire a licence for a work. In many cases, this might be impossible (see Orphaned Works);

- they address the increased complexity of rights clearance as even a literary, not to mention a multimedia work, can contain a whole bundle of rights. Without an effective rights clearance process, legitimate access by well-intentioned users would be cumbersome or even denied;
- they usually provide libraries with indemnity from unintentional infringement in relation to the licensed works.

In reality, however, the practice is not always the same. Although libraries are often the biggest customers of RROs, the relationship is not always easy. Authors and publishers are represented within all RROs, but users seldom are. An RRO functions as an intermediary between rights owners and users, but it is not a neutral party. The purpose of an RRO is to obtain maximum financial reward for its members (authors and publishers)<sup>xiii</sup> and to ensure that their interests are paramount<sup>xiv</sup>.

Librarians have experienced a number of concerns regarding collectives:

- lack of efficiency. Sometimes collectives can be very slow in responding to library requests for licences;
- lack of transparency. It may be unclear according to which principles prices are calculated and administration costs may seem disproportionate, eating into the amount paid to the rights holder;
- libraries are in a weak bargaining position, in a similar way as when negotiating access to electronic resources with publishers. The RRO holds the monopoly rights on behalf of the rights holder and the library may have to pay the asking price in a "take it or leave it" fashion;
- the licence may include clauses unfavourable to libraries e.g. removing statutory exceptions under copyright law, thus requiring the library to obtain a licence and pay for such uses.

See also The Relationship between Copyright and Contract Law: Electronic Resources and Library Consortia.

To address some of these concerns, libraries support a code of conduct to ensure that collectives are open, accountable, transparent and efficient and demonstrate fair practice when dealing with all stakeholders. There should be easy procedures for handling complaints e.g. independent dispute resolution and a fair mechanism for their external supervision.

Libraries should:

- create or join a library consortium to acquire more bargaining power when negotiating licences;
- never sign a licence for anything you don't need to. A licence is only necessary for copying *over and above* what is permitted by the law. If the photocopying practice in the library falls within uncompensated national copyright exceptions, a licence is not required;
- never sign a licence that overrides statutory rights for usage under copyright law;
- insist that the library, not just the legal signatory, is party to any negotiations;
- insist that the internal administration, collection and distribution of funds are transparent and efficient.

The number of collectives involved in the licensing of a single economic use of a protected work is problematic. Certain categories of works, and even certain rights holders, may be excluded from the licence. Libraries may have to deal with multiple RROs for different categories of material e.g. books, maps, printed music, photographs. The RRO may not hold the digital rights, which may lie with the rights holder. Libraries would therefore benefit from a one-stop-shop collective for all types of works and rights, including digital rights.

### **Challenges in developing countries**

At its centenary meeting in 1996, the International Publishers Association (IPA) passed a resolution calling for the creation of an independent reproduction rights organisation (RRO) in every country of the world. IFRRO has established regional committees for Asia/Pacific, Africa and the Middle East, Latin America and the Caribbean, whose mandate is to assist in the development of a legal framework, to set up and encourage RROs and to combat all forms of illegal copying in the region.

IFRRO is aware that emergent RROs are being set up in countries with fewer resources and with many political, economic and social problems<sup>xv</sup>. This makes it surprising that the first market sector to be targeted by emergent RROs is usually the education sector. This is partly because schools and universities may be heavy copiers of copyright material, but mostly because the decision-maker is easy to locate. As the goal is to generate the maximum return in the shortest time, publicly funded bodies, government departments, libraries, cultural and research institutions are also targeted.

Access to information and knowledge is critical to the education and training needs of poor countries, whose human capital is central to their development. It is vital that scarce funds are not diverted from basic educational needs, front-line activities or the purchase of primary resources by libraries, upon which students almost entirely depend.

Another factor is that regions, such as Africa, are net consumers of copyright goods, leading to a concern that African collecting societies might become "foreign revenue collectors"<sup>xvi</sup> i.e. sending more money out of the country than they receive in return. Although special bi-lateral licensing arrangements for emergent RROs may exist, vigilance is needed to ensure that negotiations with librarians, as well as the collection and distribution of royalties to local creators, is open and transparent.

It would be, however, more equitable if emergent RROs began their activities in the commercial sector such as financial services, pharmaceutical companies and the professions (law firms, accountants, architects, etc.), instead of targeting the poorest and most vulnerable in the non-commercial sector.

### **Library position statements**

Australian Library and Information Association (ALIA) Copyright collecting societies: proposed code of conduct <http://alia.org.au/advocacy/submissions/code.of.conduct.html>

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## **PUBLIC LENDING RIGHT**

### **What is Public Lending Right?**

Public lending right (PLR) can apply to two separate concepts.

1. Public lending right may fall under copyright as one of the time-limited monopoly rights granted to the copyright owner of a protected work. In this case, it grants the owner the right to authorise or prohibit the public lending of a protected work after the work has been distributed to the public e.g. after it has been published. The copyright owner may be the author or it may be a commercial enterprise to whom the author has transferred their copyright e.g. a publishing company. Public lending can be authorised through licensing schemes and payment through collecting societies (who manage rights on behalf of rights owners). In some countries, an alternative to PLR is set out in copyright legislation, this is known as the remuneration right.
2. Public lending can also be a "remuneration right". This focuses more directly on the author. It is the right of an author (not necessarily the copyright owner) to receive financial compensation for the public lending of their work. In this case, a country may set their own criteria for who is eligible to receive payment and it may be designed in support of cultural objectives e.g. payments may be limited to authors who write in the national language in order to support the development of national culture.

The public lending right applies only to works in material formats e.g. printed books, sound recordings. It does not apply to electronic material or extraction of information from a database, both of which are subject to a licence.

See "The Relationship between Copyright and Contract Law: Electronic Resources and Library Consortia".

### **Practice**

According to the PLR International Network<sup>xvii</sup>, nineteen countries<sup>xviii</sup> have established PLR schemes and a further twenty-one countries have PLR systems in development<sup>xix</sup>.

It is important to realise, however, there is no international economic right for public lending, in other words, there is no international treaty or convention requiring any country to establish a PLR system. (In fact, it was decided to exclude PLR when the WIPO Copyright Treaty was being negotiated in 1996 because of the affect this might have on libraries and education in developing countries).

### PLR in the European Union

There is, however, a legal requirement on members of the European Union (EU) to establish a PLR system. This is because the European legislator introduced a directive (a law binding on Member States) on rental and lending right in 1992. As well as the twenty-five Member States of the European Union (to become twenty-seven in 2007), directives must also be implemented by non-member countries that wish to benefit from the single European market, such as European Economic Area countries, Norway, Iceland and Liechtenstein.

In fact, PLR is a European invention, originating in the nineteenth century from literary authors who believed they were losing income from sales due to the availability of their books in the emerging system of public lending libraries. The first country to establish PLR was Denmark

in 1946, followed soon after by Norway and Sweden.

In a nutshell, European law requires that authors of books, films and any other copyright works and (at Member States' discretion) other right holders, either have the right to authorise or refuse lending of their works by institutions such as public libraries, or that they are remunerated for such public lending. In other words, it accommodates both concepts of PLR.

The record shows that the majority of EU Member States have not taken to PLR with great enthusiasm. According to the 1992 directive, the European Commission should have issued a status report on implementation in 1997. Due to serious delays in several Member States, the Commission could not write its report until 2002, ten years after the Directive came into force. The Commission has taken thirteen of the original fifteen Member States to task including France, Greece, Ireland, Luxembourg, Netherlands, the UK. In some cases, it has initiated infringement proceedings at the European Court of Justice for either not implementing the Directive at all or for incorrect implementation (Belgium, Italy, Portugal and Spain have been successfully prosecuted). In addition, there were concerns that Scandinavian countries applied PLR in a discriminatory way, granted only for national or resident authors (Sweden) or for items published in the national language (Denmark, Finland).

This may in part be due to the nature of directives, a flexible instrument of European law, leaving room for Member States to unintentionally misinterpret the directive or the amount of leeway allowed by the directive. Indeed, one of the major problem areas was that, although the directive allowed for certain types of lending establishments to be exempted, several Member States exempted many types of lending institutions. In the opinion of the European Commission, if in practice most lending establishments are exempt, there is a risk that PLR is not effective.

The other reason may be that for most countries, public lending right was not part of the national tradition and was an alien concept that required the establishment of new systems of administration and remuneration. Some Member States support authors by other means, such as generous tax breaks.

#### How are payments calculated?

Each country calculates the payments differently. In the EU, remuneration is for the "use" of the work (which means that it can include reference works not usually lent out by the library). Others calculate payments on the basis of the number of times the author's books are borrowed, the number of copies held in library stock, the number of registered users or by direct grants to authors negotiated with representative organisations.

The rates of payment to authors are generally modest, and there may be a ceiling on the maximum amount that can be paid to an individual author. The cumulative amounts can be substantial, however. PLR costs Denmark approximately €20 million (\$26.6) each year, about 5% of public library expenditure<sup>xx</sup>. In 2006, PLR in the UK cost over €11 million (\$15 million)<sup>xxi</sup>.

In all countries except the Netherlands, the remuneration payments and the cost of administration of PLR schemes are met by the state.

#### **Policy issues for libraries**<sup>xxii</sup>

When a Danish author claimed remuneration for the public lending of his books at the first annual conference of the Danish Library Association in 1917, libraries and publishers opposed the idea, sparking a debate on whether library lending benefited or disadvantaged authors.

An underlying assumption that lending from public libraries results in lost primary sales is unproven. Libraries are major purchasers of published works, often buying in multiple quantities. They enable borrowers to discover new authors through book promotions or serendipity, providing a platform for nationwide dissemination of an author's work.

Where PLR has been established, public libraries are the bedrock of the system. Libraries supply data on book loans, stock holdings or numbers of registered users to PLR administrators for the annual calculation of payments. Library co-operation is essential to creating, maintaining and administering a PLR system. In countries with well-run PLR schemes and where librarians are closely consulted on the establishment and administration of the scheme, the experience for libraries has largely been positive. It creates new opportunities to forge partnerships with authors and to promote the role of the public library e.g. through author readings and public author support for libraries.

The International Federation of Library Associations and Institutions (IFLA) does not, however, favour the principles of lending right, which it believes can jeopardise free access to the services of publicly accessible libraries<sup>xxiii</sup>. Public lending is essential to culture and education and should be freely available to all. This position is based on a number of established principles including:

- IFLA's core values;
- the public library shall in principle be free of charge;
- the lending of published materials by libraries should not be restricted by legislation or contractual provisions;
- funds for the payment of public lending right should be provided by the state and should not come from library budgets.

It goes on to make recommendations concerning the introduction or modification of PLR systems, funding, the legal framework, legislative definitions, consultation and involvement of librarians in the establishment and running of PLR systems.

### **PLR and developing countries**

IFLA also states that the public lending right should be rejected in the greater public interest in situations where a country cannot afford to fund PLR without diverting resources from more fundamental public services. In particular, it should not be established in countries that are not considered high or middle income by the World Bank.

The first priority is that monies allocated for cultural and educational purposes are used to provide wide access to education and the development of a good public library service and infrastructure. Libraries must be able to focus their budgets on improving literacy rates and addressing basic educational needs, providing students with access to modern learning resources, developing innovative services to bring needed information to rural or underprivileged communities e.g. healthcare, agricultural techniques and democratic participation.

### **Public lending right in the digital age?**

PLR applies only to tangible material such as printed books. It does not apply to electronic books or online material. There is a question mark over the role of PLR in the digital age where rights holders have more control over the access and use of electronic material through a combination of legal mechanisms (licences) and technological means (technological protection systems). For example, if a user borrows a book from a public library, the rights owner cannot control who reads the book or where it is read, whereas for digital resources, they can exercise such control. Librarians must be vigilant to ensure that these factors are

taken into account in any move towards evolving PLR for digital material.

### **Library position statements**

EBLIDA statement on the infringement procedures over Public Lending Right  
[http://www.eblida.org/position/PLR\\_Statement\\_March04.htm](http://www.eblida.org/position/PLR_Statement_March04.htm)

IFLA Committee on Copyright and other Legal Matters (CLM)

Background paper on public lending right  
<http://www.ifla.org/III/clm/p1/PublicLendingRight-Backgr.htm>

IFLA Position on Public Lending Right  
<http://www.ifla.org/III/clm/p1/PublicLendingRigh.htm>

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[http://ec.europa.eu/internal\\_market/copyright/rental-right/rental-right\\_en.htm](http://ec.europa.eu/internal_market/copyright/rental-right/rental-right_en.htm)

PLR International  
<http://www.plrinternational.com/>

## THE DATABASE RIGHT – EUROPE'S EXPERIMENT

### Databases: copyright and database right

A database is a searchable collection of independent works, data or other material arranged systematically. A database can be both electronic or non-electronic e.g. a library card catalogue. Facts and data per se, such as mathematical formulae or the ocean tides are not eligible for copyright protection, but *collections* of data are copyrightable. In other words, a database is copyrightable if it is "fixed" in some tangible form and if it is original.

There are two thresholds for originality. In civil law countries with the "droit d'auteur" tradition, an element of "intellectual creation" is required. In common law countries, copyright protection is granted if the compilation required considerable skill, labour or judgement (known as "sweat of the brow" copyright). This means that, in general, fewer databases in civil law countries are protected by copyright, because the higher threshold means that only so called "original" databases are protected.

In 1991, the US Supreme Court (common law tradition) made it clear in the *Feist*<sup>xxiv</sup> case, however, that unoriginal compilations of facts are not copyrightable. Requiring "originality" in the copyright sense rather than applying the sweat of the brow criteria, the Court ruled that an alphabetically ordered telephone directory did not qualify for copyright.

In the meantime, the European Commission considered that the European market was "fragmented by many technical, legal and linguistic barriers"<sup>xxv</sup>. Database protection in Member States with a civil law tradition differed from that of common law countries (UK and Ireland). The Commission believed that this harmed the free movement of database products within Europe and observed that the UK alone, with its lower sweat of the brow standard, produced 50% of European on-line database services. (Of course, this could also be explained by other factors, such as the language in which the database is produced). The Commission believed that by increasing protection for databases in Europe, it would stimulate the development of the database industry and enable it to compete with the US.

In its 1996 Directive on the Legal Protection of Databases<sup>xxvi</sup>, the Commission tried to find a middle ground. It harmonised the threshold of "originality" to the higher standard that applied in droit d'auteur countries, meaning that copyright protection applied only to so-called "original" databases. In a second step, a novel new right was created to protect those "unoriginal" databases that had previously enjoyed protection under sweat of the brow copyright, but which no longer qualified under the higher standard of originality. Known as the database or "sui generis" right, it grants protection to *makers* of databases who have made a substantial investment in their production. Also referred to as a "publishers' right"<sup>xxvii</sup>, it applies to databases that are economically important to the producer, but are nonetheless non-creative.

Sui generis means "of its own kind" or unique in its characteristics. Perhaps with a view to gaining a competitive advantage over database producers in the US, it granted legal protection in one fell swoop to non-original databases (such as alphabetical telephone directories), of a kind without precedent in any international convention. This means that the principle of national treatment, whereby imported and locally produced goods are treated equally, did not apply. This in turn meant that US database producers could not avail of the new right. Thus began Europe's database experiment.

## **Practice**

In a nutshell, the database right grants the maker of a database (usually the publisher), who has made a substantial investment in either the obtaining, verification or presentation of the contents, an exclusive right of extraction (similar to the right of reproduction in copyright), a right of reutilisation (like the right of communication to the public), plus a right of distribution. The term of protection is fifteen years, extended by a further fifteen years whenever a substantial change is made to the database. The Directive provides for a small number of exceptions and limitations.

Like copyright, the database right is automatic, and it may apply to all European databases irrespective of whether they are also protected by copyright. For copyright protection to apply, the database must have originality in the selection or arrangement of the contents. For the database right to apply, the selection and arrangement must be the result of a substantial investment<sup>xxviii</sup>. This means that it is possible to satisfy both requirements, whereby copyright and database right apply at the same time. The actual content of the database may or may not be subject to copyright, depending on the nature of the content.

This has caused a lot of confusion for users of databases, including libraries. The complexity of the two tier approach often makes it unclear what is protected or for how long. The exceptions and limitations do not accord with those of the later copyright Directive<sup>xxix</sup> and it is unclear which Directive prevails. Academics have claimed that the database right impedes research by limiting access to and the use of scientific data, which in itself may not be copyrightable. Vague and ambiguous terms such as "substantial investment" have resulted in different interpretations by the national courts, leading to legal uncertainty.

### Recent developments

There have been two important recent developments. In 2004, the European Court of Justice, supreme court for the European Union (EU), made its first ruling on the database Directive in four joined cases concerning fixture lists for football and horse-racing. In a decision reflecting public policy issues, the Court reduced the scope of the *sui generis* right by curtailing database protection for so-called sole source database providers. Under the ruling, the British Horseracing Board, which creates lists of horse-racing fixtures as an intrinsic part of its activities, is not granted *sui generis* protection, as this may create an undue monopoly and based on the database right, could otherwise limit the creation of downstream spin-off products. This means that alphabetical telephone directories, TV listings, etc. no longer enjoy *sui generis* protection. In addition, the scope of protection has been reduced, whereby the only test for infringement is whether what is taken from the database reflects the substantial investment of the database producer.

In 2005, the European Commission undertook an evaluation of the effects of the database right. In a somewhat unusual, but welcome, step, it conducted an empirical evaluation of whether the "experiment" was succeeding. It concluded, "the economic impact of the "*sui generis*" right on database production is unproven. Introduced to stimulate the production of databases in Europe, the new instrument has had no proven impact on the production of databases"<sup>xxx</sup>. The evaluation presented four policy options: repeal the whole Directive; repeal the *sui generis* right; amend the *sui generis* provisions or maintain the status quo. Following a public consultation in 2006, the Commission will provide a final assessment on whether legislative changes are needed or not.

## **Policy issues for libraries**

Libraries collect, organise and preserve information and knowledge for the purposes of making it available to students, researchers and the general public in order to benefit society as a whole. In the digital environment, most content is stored in databases. In this regard, libraries have a dual role. Libraries are heavy database users, licensing access from publishers to electronic material stored in databases. Libraries are also producers of databases such as those resulting from digitisation projects, library catalogues and metadata registries created by libraries.

In principle, libraries oppose the introduction of new rights because it imposes an additional barrier on access to knowledge, particularly to content in the public domain. New layers of rights on information mean new layers of rights for libraries to negotiate or to clear, increasing costs and hindering access. The database Directive introduced a new right favouring database producers in order to stimulate investment in the database industry. At the same time, publishers have consolidated, occasionally invoking the attention of competition authorities<sup>xxxii</sup>, thereby placing more information in fewer hands. Database production in Europe has decreased, while the Directive has proved itself complicated to understand and interpret, even for experts.

From the library viewpoint, the information environment has seen many developments. Increasing co-operation between libraries has meant that local databases merge into regional and national resources; large scale digitisation projects are being undertaken between libraries and commercial partners; metadata has emerged as a valuable tool to aid and add consistency to cross-database and internet searching. Some libraries have started to make use of the *sui generis* right as a way of maintaining control over their databases, especially when entering into partnership arrangements with commercial entities. For example, it can enable a library to ensure that access to their database is safeguarded even when it becomes part of a proprietary database.

In this context, Electronic Information for Libraries (eIFL.net) called on the European Commission to radically improve the database Directive by amending the *sui generis* right, introducing compulsory licensing and to ensure that there is coherence between the database Directive and the Info Soc Directive.

### The international dimension

The European Commission was trying for many years to introduce an international database treaty at the global policy making forum, the World Intellectual Property Organization (WIPO). As recently as 2002, the Commission championed the "success" of its *sui generis* protection, while calling on WIPO member states to extend database protection at international level<sup>xxxiii</sup>. The United States, the other major database producer, was sceptical. Since the 1991 Feist case, a few US database companies had been seeking a special database right. However, a greater number, supported by the US Chamber of Commerce, opposed the introduction of such a right believing that they could adequately protect themselves through legal means, such as contracts and technical means, such as password control. More importantly, they argued that strong database protection would make it harder to generate databases in the first place, reducing the incentive to create new database products and limiting competition in the provision of information<sup>xxxiv</sup>. In other words, it would be counter-productive.

Given their own assessment of the database Directive, it is unlikely that the European Commission will re-introduce the idea of an international database treaty at WIPO in the near future. However, the Directive encourages the extension of the *sui generis* right to third countries on the basis of forced reciprocity<sup>xxxv</sup>. Any country negotiating a trade agreement with the EU, such as an Economic Partnership Agreement, should be aware of the EU's own

experience with the database right and should avoid incorporating this new right into their law. (See also Copyright and Trade Agreements).

### **Library position statements**

Responses to the Commission consultation, March 2006

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Institute for Information Law, University of Amsterdam. The Database Right File. A unique collection of case law on the European (sui generis) database right

<http://www.ivir.nl/files/database/index.html>

## **CREATIVE COMMONS: AN "OPEN CONTENT" LICENCE**

### **What is Creative Commons?**

Creative Commons (CC) is a U.S. based non-profit organisation, founded by Lawrence Lessig in 2001, dedicated to expanding the range of creative works available, especially online. The internet offers new opportunities for distributing, sharing and re-using creative content. Much of this content is subject to copyright. Copyright protects a work as soon as it exists, giving the creator a set of exclusive rights over its reproduction, translation, public performance and recording. Creative Commons offers an easy way for authors, artists, musicians and other creators to choose how to make their works available and under what conditions, and for users to identify the conditions under which a work may be used.

Creative Commons uses easy-to-understand licences and a logo to help users identify Creative Commons licensed material. An electronic version of the licence contains machine-readable metadata that describes the licence and indicates the copyright status, enabling CC-licensed material to be found by search engines and other online discovery tools.

Creative Commons covers a wide range of creative content. This includes audio e.g. music, sounds, speeches; images e.g. photos, illustrations, designs; video e.g. movies, animations, footage; text e.g. books, websites, blogs, essays; educational material e.g. lesson plans, course packs, textbooks, presentations.

Several million pages of web content now use Creative Commons licences. Some well known websites that use CC-licensed content include the photo sharing website Flickr, the Internet Archive which maintains an archive of Web and multimedia resources, MIT Open Courseware, an initiative to put online educational material from the Massachusetts Institute of Technology courses.

Creative Commons is an "open content" licence, so coined to describe a family of licences that explicitly allow for copying and re-use. Other examples of open content licences, albeit with differing conditions, are the GNU Free Documentation License (used by Wikipedia) and the Free Art licence.

### **Practice – how Creative Commons licences work**

Creative Commons offers a voluntary, flexible set of licence options chosen according to the level of protection and freedom that an author or artist wishes to have. The licences build upon the "all rights reserved" concept of traditional copyright to use across a spectrum from "some rights reserved" to dedication to the public domain known as "no rights reserved".

Each licence contains certain baseline rights and a number of options chosen by the creator, depending on how they want their work to be used. The options are:

- Attribution: this lets others copy, distribute, display and perform a copyrighted work including derivative works, but only if they give credit (attribution);
- Non-commercial: this lets others copy, distribute, display and perform a work including derivative works, but only for non-commercial purposes;
- No derivative works: this lets others copy, distribute, display and perform only verbatim copies of the work, and not derivative works based upon it.

- Share alike: this allows others to distribute derivative works but only under a licence identical to the licence that governs the original work.

This results in six main types of licence plus a few others for specialised applications e.g. sampling licences. Each licence type has three versions:

- a "Commons Deed" that explains in simple terms what is permitted under the licence and uses easy to recognise symbols;
- a "Legal Code" aimed at lawyers which is the full text of the licence;
- a machine-readable version containing RDF/XML metadata that describes the licence, enabling CC-licensed works to be located by search engines on the web.

Science Commons, an offshoot of Creative Commons, aims to remove unnecessary legal and technical barriers to scientific collaboration and innovation. Their long term vision is to provide more than just useful contracts, but to also combine publishing, data and licensing approaches into an integrated and streamlined research process.

### **Policy issues in considering Creative Commons licences**

Creative Commons licences originate from the United States and so are based on U.S. law. This means that some of the concepts are not applicable to other countries of the world. Creative Commons International, another CC offshoot, is dedicated to the drafting and adoption of jurisdiction-specific licenses. This involves the literal and legal translation of the licences by volunteers to fit with the copyright law and legal system of a particular country. National Creative Commons licences have been adopted so far in thirty-four countries from Argentina to the UK, with a further 20 under development.

Before deciding to assign a Creative Commons licence to a work, there are a number of other factors to consider. The work should fall within a Creative Commons licence, the licensor must have the rights i.e. they must own the copyright in the work and they must understand how Creative Commons licences operate. One important point is that Creative Commons licences are non-revocable; this means that a creator cannot stop someone who has obtained the work under a Creative Commons licence from using the work according to that licence. Of course, they can stop distributing the work at any time they wish, but this will not withdraw from circulation any copies of the work that already exist under a CC licence. Furthermore, collecting societies, who manage rights on behalf of creators, in some jurisdictions may not permit members to CC-license their works because of the way in which the creator assigns their rights to the collecting society.

### **Policy issues for libraries**

Creative Commons licences hold two aspects for libraries.

Firstly, there is the creator aspect. By and large, libraries are users rather than creators of protected content. However, routine library activities may generate content protected by copyright which the library may wish to share with others e.g. conference presentations, library building photos on the website, the library blog, etc. (It is important to remember that the library must own the copyright in the work in order to license it. In this context, it may be necessary to check the terms of employment contracts with regard to ownership of work products).

Then there is the user aspect. Libraries can avail of the millions of items of CC content when producing their own documents. For example, finding a cool new logo for the library brochure, using extracts from a recent travel guide as local visitor information for the website or including book reviews in the library acquisitions bulletin.

In June 2006, it was estimated that approximately 140 million webpages had adopted CC-licences. The Creative Commons brand has become one of the best known open content licences and receives regular coverage in the mainstream press, as well as analysis by academics and observers. As information professionals, librarians should be informed about such developments and should be able to advise library clients on issues relating to the access and use of digital content. In some institutions, the librarian has attained an expertise in legal issues in the digital environment and can play a role in keeping colleagues abreast of fast-moving developments in this increasingly complex area.

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Unbounded Freedom. A guide to Creative Commons thinking for cultural organisations  
<http://www.counterpoint-online.org/cgi-bin/item.cgi?id=618>

## **OPEN ACCESS TO SCHOLARLY COMMUNICATIONS**

### **What is Open Access?**

“Open Access” (OA) means the free (gratis) availability of peer-reviewed literature to the public on the internet, permitting any user to read, download, copy, distribute, print, search, or link to the full texts of the articles (*Budapest Open Access Initiative* (2002)). There are two ways in which this can be realised: through **open access journals** and through institutional or subject-based **repositories**.

An **open access journal** is freely available online and does not rely upon traditional subscription-based business models to generate income. Instead, new business models including an article processing fee, sponsorship, advertising or a combination of these are used. Peer-reviewed OA journals have been launched across numerous disciplines including biology and neglected tropical diseases from the *Public Library of Science* (*PloS*), while *BioMed Central* and *Bioline International* collectively publish over 255 titles. In October 2009, the *Directory of Open Access Journals* (*DOAJ*) lists over 4,358 titles. Furthermore, a number of major traditional publishers including Oxford University Press, Springer and Elsevier offer authors the option of placing their journal articles on open access in exchange for payment of a fee, known as an article processing charge.

An **institutional repository** is a publicly accessible archive where the work published by authors affiliated with the university or institution is posted online. These may be pre-prints and/or the finished articles. There may be some holdback and/or other conditions attached to posting the final edited version of the article (as published in traditional journals) to the repository, but an increasing number of journal publishers are co-operating with repositories. Using interoperable software which is Open Archives Initiative (OAI) compliant, the deposited works can be searched and harvested. Examples of OAI compliant open source software are *DSpace*, *EPrints*, and *Fedora*. The *Directory of Open Access Repositories* (*OpenDOAR*) is a searchable directory of academic OA repositories and their content.

Open access has changed forever the landscape of scholarly communications, while the economics of OA is still debated among academics and researchers, university administrators, librarians, funding agencies and commercial and learned society publishers.

The first global **Open Access Week** took place in October 2009.

### **What is the driving force behind Open Access?**

Scientists and academic authors strive for maximum impact for their work. The more their research output is cited and used, the better it is for their career and institution, future funding possibilities as well as the overall benefit of science and society. Spurred by the move from the paper to the electronic working environment, the structure within which researchers work has been changing rapidly. New tools of communication have caused researchers to become increasingly aware of the restrictions and barriers to accessing their work, and the work of their peers, under the traditional journal publishing system. This typically required authors to transfer their copyright to the publisher, thus removing their control over distribution of the work e.g. an author could be prevented from posting their own work on their personal website or distributing it in class to their students. Research output was thus available only to those institutions subscribing to the journal in question.

The European Commission's *Study on the Economic and Technical Evolution of the Scientific Publication Markets in Europe* (2006) confirmed that between 1975 and 1995, the price of

print journals had risen by 300% above the cost of inflation. Such annual above inflation increases in journal prices combined with decreasing library budgets led to a “serials crisis”, where libraries were cancelling subscriptions not only to low use titles but also to core titles.

Funding agencies want to ensure that the research they fund has the greatest possible research impact (measured in the number of citations) and that publicly funded research is made publicly available. Yet they found that sometimes they could not access the results of research that they themselves had funded because their institution did not subscribe to the journal in which it was published. In particular, debate on the right of public access to publicly funded research has led to new policies for grantees e.g. in December 2007 the United States adopted a mandate directing the U.S. National Institutes of Health to provide open online access to the findings of research it has funded (which currently amounts to \$29 billion annually), while the Wellcome Trust's *Position Statement in Support of Open and Unrestricted Access to Published Research* (2005) requires self-archiving within six months.

If the traditional publishing system alone were to continue, peer access to research outputs would become increasingly restricted since libraries can no longer afford to provide sufficient access to traditional journal articles. The global movement for change to introduce OA journal publishing and open institutional repositories for research papers and data that has resulted from this dissatisfaction, has garnered support from academics, prestige funding institutions, legislators and libraries, and continues to grow.

## **Policy**

### **OA policy milestones**

2002: The *Budapest Open Access Initiative (BOAI)* backed by Open Society Institute (OSI) was the first major international statement of principle and commitment in support of OA. It offers the first definition of OA and sets out the strategies and goals for access to scholarly communications.

2003: the **Howard Hughes Medical Institute (HHMI)** produced the *Bethesda Statement on Open Access* and the **Max Planck Society** the *Berlin Declaration*. Both provide definitions of OA and focus on the role of funders.

2004: the UK **House of Commons Science and Technology Select Committee** *Scientific Publications. Free for All?* report recommended that all UK higher education institutions and government-funded research councils establish free-of-charge online institutional repositories and called for support of OA journals.

2005: the UK's **Wellcome Trust** became the first research funder to mandate OA to the research that they support.

2006: a **European Commission** funded **study on the scientific publication markets in Europe** recommended that funding agencies mandate that European funded research publications be made available in OA archives. The seven **UK Research Councils** adopted OA mandates in respect of the research they fund.

2007: the **Ukraine Parliament** mandated OA for publicly funded research. In December the **European Research Council** issued *Guidelines for Open Access*.

2008: a **European Commission** Science in Society pilot project was launched to make results from approximately 20% of 7<sup>th</sup> Research Framework Programme (FP7) projects available on OA. The **European University Association** recommended OA for University Leadership. **Harvard University's Faculty of Arts and Sciences** became the first U.S. faculty to vote

unanimously for an OA mandate.

2009: the **new Lithuanian law on science** requires publicly funded research to be openly accessible online. A Bill for a *Federal Research Public Access Act*, originally proposed in 2006, was reintroduced in the U.S. Senate – requiring OA for all research funded by the 11 largest governmental funding agencies. The **University of Kansas** became the first public university in the U.S. to adopt an OA policy for its research outputs.

### **OA and developing and transition countries**

2005: the *Salvador Declaration on Open Access* was adopted at an international seminar in Brazil.

2006: The **Academy of Science of South Africa's Report on a Strategic Approach to Research Publishing in South Africa** found that in the previous 14 years, one-third of South African journals had not had a single paper cited by their international counterparts; fewer than 10% of South Africa's 255 accredited journals had been cited frequently enough to feature in the main international research databases, despite South Africa being the continent's leading publisher of research. Research by Chawki Hajjem et al of the Université du Québec showed that electronically available OA articles received on average 50% more citations than other articles from the same journals. A workshop convened by the Indian Institute of Science, the Indian Academy of Sciences and the M S Swaminathan Research Foundation highlighted the invisibility of unique developing country research within the corpus of international science and produced a model *National Open Access Policy for Developing Countries*.

A series of national and regional workshops sponsored by the Open Society Institute (OSI) and organised by **Electronic Information for Libraries (eIFL.net)** since 2002 has led to the establishment of over 165 OA repositories, the creation of OA working groups, pledges of support from national research foundations, and the formulation of national recommendations, such as the *Belgorod Declaration* by Belarussian, Russian and Ukrainian universities. Additionally, Hong Kong universities introduced an OA policy for publicly funded research, and open access to research information was included in the Olvia Declaration of universities in Ukraine. OA institutional mandates were established by the University of Pretoria, South Africa; Ternopil State Ivan Pul'uj Technical University, Ukraine and several institutions of the Russian Academy of Sciences, for example, Central Economics and Mathematics Institute.

### **Copyright and OA**

Uploading copyrighted material, such as scientific/scholarly work, data files to a repository usually requires permission from the rightsholder. Institutions need clear copyright policies that set out the relationship between authors and the institution, clarifying who owns the copyright in the work. The norm is for authors to retain the copyright i.e. the institution, as the employer, will not usually seek to exercise its employer's right to hold the copyright in scholarly communications. However, this should be clearly stated in institutional policies or in contracts of employment. Likewise authors may need guidance on negotiating publishing contracts with traditional journals to enable deposit of their papers in the institutional repository. The SURF Copyright in Higher Education website is a helpful source of information in this regard.

## Libraries and OA

As the stakeholders at the centre of the “serials crisis” and committed to ensuring the widest possible access to information for everyone, librarians have by and large, been among the most vocal advocates for OA. The library is usually the focal point for OA within higher education and research institutions and normally houses and maintains the institutional repository. Many library associations have issued statements supporting OA or have signed major OA declarations. Libraries are encouraged to ensure their users make use of the growing wealth of high quality, peer reviewed OA scholarly material.

### What can librarians do to promote open access?

- Launch an open access, OAI-compliant institutional repository for text and data.
- Help faculty deposit their research articles in the institutional archive.
- Help to publish open access journals and create open educational resources.
- Help with data curation and sharing.
- Spread the word, be advocates for open access.
- Show the benefits of open access to the non-academic community in the locality, especially the non-profit community e.g. undertake digitisation projects for local groups, e.g. community organisations, museums, galleries, other libraries.

Based on “What you can do to promote open access” by Peter Suber  
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What you can do to promote open access by Peter Suber  
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## Resources

Directory of Open Access Journals <http://www.doaj.org/>

Directory of Open Access Repositories <http://www.opendoar.org>

DRIVER - Digital Repository Infrastructure Vision for European Research <http://www.driver-repository.eu/>

eIFL.net Open Access Program. <http://www.eifl.net/cps/sections/services/eifl-oa>

European Research Council Scientific Council Guidelines for Open Access

[http://erc.europa.eu/pdf/ScC\\_Guidelines\\_Open\\_Access\\_revised\\_Dec07\\_FINAL.pdf](http://erc.europa.eu/pdf/ScC_Guidelines_Open_Access_revised_Dec07_FINAL.pdf)

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Registry of Open Access Repositories <http://roar.eprints.org/>

Registry of Open Access Mandates <http://www.eprints.org/openaccess/policysignup/>

Scholarly Publishing and Academic Resources Coalition (SPARC) <http://www.arl.org/sparc/> See also Author rights: using the SPARC Author Addendum to secure your rights as the author of a journal article <http://www.arl.org/sparc/author/addendum.shtml>

Science Commons Scholar's Copyright Project

<http://sciencecommons.org/projects/publishing/>

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*Revised October 2009*

## COPYRIGHT AND TRADE AGREEMENTS

### What are trade agreements?

Trade agreements, also known as free trade agreements, are contractual agreements between two or more states under which they give each other preferential market access to each other's goods and/or services. Depending on the number of parties involved or the geographical area covered, these can be multi-lateral, regional or bi-lateral agreements. A trade agreement will usually apply to all trade in goods and often extends to areas such as trade in services, recognition of standards, customs cooperation and the protection of intellectual property rights, including copyright. It is the inclusion of copyright in trade agreements that makes them relevant to libraries. Signatories to a trade agreement must usually alter their domestic laws in order to comply with the terms of the agreement.

### Practice

#### Multilateral trade agreements: the WTO and TRIPS

Multilateral trade agreements are administered by the World Trade Organization (WTO), founded in 1995. At the heart of the system, known as the multilateral trading system, are the WTO's agreements signed by the 149 WTO member states and ratified in their national parliaments. These agreements are the legal ground-rules for international commerce.

It may seem surprising that an organisation devoted to lowering trade barriers and encouraging competition would choose to add to its portfolio intellectual property, which creates limited monopolies, but that's what controversially happened with the 1995 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, known as TRIPS. For the first time, intellectual property (IP) rules were brought into the multilateral trading system, linking IP protection and enforcement with other areas of trade such as agriculture and textiles. TRIPS extends to all IP rights e.g. copyright, patents, trademarks, etc. but it does not address the issue of copyright in the digital environment (this is covered by the WIPO Copyright Treaty<sup>xxxv</sup>). TRIPS had several implications:

- it introduced the principle of *minimum* IP standards which means that any IP agreement subsequently negotiated can only create higher standards (known as TRIPS-plus);
- it removed a great deal of national regulatory discretion and introduced for the first time a global enforcement component (non-compliance can result in trade sanctions);
- it provides a mechanism for resolving disputes so that any WTO member may bring their case before a specially-appointed independent expert committee. One interesting case involved the so-called "three step test" used to evaluate the legitimacy of exceptions and limitations to copyright. In 2000, the WTO held the United States to be in contravention of its international obligations in a dispute proceeding initiated by the European Union (EU) on behalf of the Irish performing rights organisation<sup>xxxvi</sup>. Taking an unaccustomed stance on copyright, however, the US has so far failed to amend its law and continues instead to pay a fine<sup>xxxvii</sup>;
- it introduces the ability to "cross retaliate" across trade sectors. In 1999, when a WTO dispute panel found in favour of Ecuador in a dispute with the EU over banana exports, Ecuador requested to suspend implementation of TRIPS, focusing on sensitive sectors for the EU such as copyrights in the music industry and geographical indications for alcoholic beverages<sup>xxxviii</sup>.

### Developing countries and TRIPS

Over three quarters of WTO members are developing or least-developed countries, yet it is estimated that only about fifteen developing countries took an active part in the TRIPS negotiations<sup>xxxix</sup> and only one Least Developed Country (Tanzania)<sup>xli</sup>. Developing countries initially resisted bringing IP within the global trading system of the WTO. In the end, they succeeded in including two important Articles which make it clear that in introducing IP protection, countries should frame the rules "in a manner conducive to social and economic welfare<sup>xlii</sup>. In other words, IP is not an end in itself. The WTO Doha Declaration on TRIPS and Public Health (2001)<sup>xlii</sup> draws directly from these two Articles.

Transition periods for implementation were agreed: developing and transition countries were given an extra four years i.e. until 1st January 2000 and Least Developed Countries (currently 32) until 1st January 2006, later extended to 1st July 2013. This recognises that TRIPS reaches deep into the internal legal system of a country and comes with costs, requiring the introduction of minimum standards, border controls, domestic enforcement procedures, and the setting up of the respective authorities.

In 1995, the World Intellectual Property Organization (WIPO) entered into a cooperation agreement with the WTO to provide technical assistance to developing countries on TRIPS implementation. This includes legislative advice, automation of national IP offices and training. In recent years, WIPO's programme has been much criticised by observers for taking a TRIPS-plus approach and for not providing the best advice to developing countries. Reform of the WIPO technical assistance programme is one of the elements of the Development Agenda for WIPO proposed by fourteen developing country member states. (See A Development Agenda for WIPO: International Policy Issues).

### Bilateral trade agreements

One of the reasons why developing countries accepted TRIPS was because they believed that a multi-lateral framework for IP would put an end to bi-lateral pressures such as the U.S. "Special 301" procedure. (This enables US trade representatives to threaten trade sanctions on countries which it deems to provide insufficient protection for US persons who rely on IP rights). However, a recent proliferation of bilateral and regional trade agreements, led in particular by the US and the EU, indicate that we are re-entering a bilateral phase and that many of these agreements adopt the so-called maximalist approach<sup>xliii</sup>. This is known as the "double backdoor" policy: as more countries adopt TRIPS-plus (higher) standards, they become the norm and are more likely to be included in any revision of TRIPS<sup>xliv</sup>.

Two of the world's largest trading blocs have different names for their agreements. The United States agreements are called "free trade agreements" (FTAs) whereas the European Union agreements are usually known as "Economic Partnership Agreements" (EPAs). Both usually amount to the same thing: an extensive chapter on IP and the adoption by the receiving country of the "highest international standards of IP protection" (Tunisia, Jordan, Palestine EPAs) or "...a standard of protection similar to that found in United States law..." (negotiating objective for FTAs).

FTAs can include the following IP provisions:

- extension of the term of protection by an additional 20 years beyond TRIPS;
- U.S.-style obligations against circumventing technological protection measures;
- liability of internet service providers when copyright infringing material is distributed over their networks;
- prohibition of parallel imports of copyrighted works that have been lawfully sold in

- foreign markets;
- enforcement obligations beyond TRIPS requirements. Critical to developing countries, lack of resources cannot be invoked as a reason for non-compliance with enforcement obligations;
- adherence with the WIPO internet treaties (1996);
- in copyright infringement cases, the burden of proof can be placed on the defending party to show that the activity was non-infringing.

Each of these provisions could have a negative impact on libraries, illustrating the importance of library involvement in any negotiations. Developing countries in particular may have competing financial priorities, such as healthcare and basic education, from which resources should not be diverted. Such concerns have led to public debate, and sometimes protest, in several countries where bi-lateral trade agreements are being negotiated.

## **Policy Issues For Libraries**

Copyright provisions in international trade agreements, translated into national law, can have a great impact on the operation of libraries and the services they provide to their users. By imposing new obligations and strengthening enforcement, bi-lateral agreements can upset the traditional balance of rights and exceptions, so important to libraries, in international agreements and also perhaps in national law. This means that libraries are important stakeholders and must be consulted during any trade negotiations. This is not always easy for a number of reasons.

Unlike other areas of policy making, trade negotiations are often held behind closed doors with little or no public scrutiny. For example, the WTO TRIPS Council, which monitors the operation of TRIPS, holds its meetings in private with no observers from civil society. It can be difficult to find even basic information such as the timeline for bi-lateral trade negotiations or to obtain copies of documents under discussion. Negotiations are conducted by trade officials who may have little or no knowledge of copyright or the implications of their decisions for libraries, education and culture. Negotiators may concede to TRIPS-plus provisions as a trade-off to another sector, such as agriculture.

However, it is incumbent upon librarians and professional library associations to inform themselves of trade agreements being negotiated by their government, to ascertain the effect of any copyright-related provisions on access to knowledge, education and scientific research and to put forward counter-proposals to mitigate any negative effects.

Help is available. There are many sources of information such as bilaterals.org which report on "everything that's not happening at the WTO". Members of the consortium Electronic Information for Libraries (eIFL.net) can avail of the IP programme for assistance. The International Federation of Library Associations and Institutions has issued policy statements on the WTO and TRIPS.

Market access sets quotas, which may change from time to time, for the export of goods from one country to another. If a country gives legal protection in return for market access, however, it is usually forever. This is why the library community must have a say.

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## **INTERNATIONAL POLICY MAKING: A DEVELOPMENT AGENDA FOR WIPO**

### **WTO and WIPO**

National copyright laws are usually based on international copyright treaties so being informed about international developments and policy making will lead to a better understanding of the way in which copyright laws are implemented nationally. The two main organisations involved in setting the international copyright agenda are both based in Geneva.

The **World Trade Organization (WTO)** administers and enforces **TRIPS** (Agreement on Trade Related Aspects of Intellectual Property Rights 1995), the multilateral trade agreement that brought copyright into the global trading system. There are currently 153 members of the WTO (and consequently also of TRIPS). Least Developed Countries have until July 2013 to accede to TRIPS. (See also the chapter on *Copyright and Trade Agreements*).

The **World Intellectual Property Organization (WIPO)** administers three key copyright treaties.

- **Berne Convention** for the Protection of Literary and Artistic Works 1886 (amended 1971) - 164 member states, October 2009
- **WIPO Copyright Treaty (WCT)** 1996 – 70 member states, October 2009
- **WIPO Performances and Phonograms Treaty (WPPT)** 1996 – 68 member states, October 2009.

In 1974, WIPO became a specialised agency of the United Nations with a mandate subject to a number of other UN organisations dealing with innovation, development and intellectual property. Its practice turned out rather differently and is illustrated by the strategic goal "to promote an IP culture" in its 2006-2007 programme. Unlike other UN agencies, WIPO does not depend upon contributions from member states for funding, but instead gets 90% of its income from the collection of fees under the patent registration scheme which it administers. It is thus largely funded by rightholders, who naturally have an interest in expanding IP protection. This is reflected in the involvement of business and industry groups at WIPO. Some have partnership agreements with WIPO to co-organise global training seminars and, until recently, their representatives dominated the non-governmental organisations at committee meetings.

In a co-operation agreement with the WTO, the WIPO Secretariat provides technical assistance and legislative advice to developing countries on national implementation of the TRIPS Agreement. The programme has been criticised for over-emphasising the benefits of IP for rightholders while paying little attention to the costs, and for encouraging developing countries to implement IP regimes that are in excess of the requirements under TRIPS , known as the "TRIPS plus" approach.

### **A Development Agenda for WIPO**

Over the years, some WIPO member states came to the view that WIPO is failing to meet the needs of developing countries with regard to intellectual property. In their view, WIPO was out of step with current thinking in other organisations, such as the World Bank and the WTO, which had undertaken evaluations to ensure that their actions achieve development-oriented results. WIPO was falling short of its original mandate, and should integrate the development dimension into all its activities, guided in particular by the UN Millennium Development Goals.

At the WIPO General Assemblies in September 2004, Brazil and Argentina made a historic proposal to establish a “development agenda” within WIPO. Joined by Bolivia, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela, the “Group of Friends of Development” set in train a process that would reverberate, not only within the corridors of WIPO, but among civil society interest groups around the world. The Development Agenda aims to re-orient WIPO to its original goal to promote intellectual creativity, rather than intellectual property, i.e. IP as a means to an end, rather than an end in itself. The Group of Friends of Development stressed that the development dimension goes beyond the provision of technical assistance and is a cross-cutting issue for all WIPO activities. All countries will benefit from this more balanced approach, not only developing countries. The overall aim is to promote development and access to knowledge for all.

Key elements of the original proposal were to:

- Reform WIPO's governance structure to strengthen the role of member states in guiding WIPO's work and to establish an independent Research and Evaluation Office;
- ensure wider participation of civil society and public interest groups in WIPO's discussions and activities;
- introduce evidence-based Development Impact Assessments and greater public consultation for any proposed treaties;
- adopt technical assistance programmes that are development-focused, non-discriminatory and tailored to respond to the needs of a range of stakeholders;
- adopt a proposal for a Treaty on Access to Knowledge and Technology.

## **Recommendations for a Development Agenda**

Over the next three years, member states discussed 111 proposals put forward by individual countries in specially convened committees - Inter-sessional Intergovernmental Meeting on a Development Agenda for WIPO (April, June, July 2005); Provisional Committee on Proposals Related to a WIPO Development Agenda (February, June 2006, February, June 2007). Following negotiations that were sometimes tense, 45 Recommendations for a Development Agenda were finally adopted at the WIPO General Assembly in 2007.

The Recommendations are grouped in six clusters:

- Cluster A: Technical Assistance and Capacity Building
- Cluster B: Norm-setting, flexibilities, public policy and public domain
- Cluster C: Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge
- Cluster D: Assessment, Evaluation and Impact Studies
- Cluster E: Institutional Matters including Mandate and Governance
- Cluster F: Other Issues (promoting technological innovation “to the mutual advantage of producers and users ... and to a balance of rights and obligations”).

Nineteen proposals were identified by the General Assembly for immediate implementation. Implementation of the Recommendations is overseen by a new Committee on Development and Intellectual Property (CDIP) that meets twice a year in Geneva. The first session took place in March 2008 attended by 99 member states, 7 intergovernmental organisations and 31 non-governmental organizations (including eIFL). In 2008, rules of procedure were agreed, a work program was discussed for the 45 proposals, including human and financial resources, as well as proposals on how to transform the Recommendations into concrete activities. In 2009, the Secretariat proposed a methodology for implementation of the Recommendations, and a set of thematic projects that address specific Recommendations. Meanwhile, the Secretariat established the Development Agenda Coordination Division

(DACD) to maintain a central coordination structure, to act as the interface with external stakeholders and with the aim to mainstream the implementation of the Development Agenda recommendations within WIPO.

## **Libraries and the WIPO Development Agenda**

The international library community has, since the start, actively supported WIPO member states who belong to Group of Friends of Development. eIFL.net and IFLA were early signatories to the **Geneva Declaration on the Future of WIPO (2004)**, adopted by leading academics, Nobel prize winning scientists, access to medicine advocates and free software developers. The Declaration was the first public statement setting out concerns and goals, and called for a moratorium on the creation of new treaties that expand and strengthen monopolies and further restrict access to knowledge; on WIPO to address the substantive concerns of civil society groups, such as the protection of consumer rights and to give priority to long-neglected concerns of blind and visually impaired people, libraries and education. The international library community is part of the broad coalition known as the **Access to Knowledge (A2K)** movement.

Since 2004 eIFL.net, IFLA, and subsequently, the U.S. Library Copyright Alliance (LCA) have invested considerable resources to ensure regular attendance at some 25 WIPO committee and general assembly meetings covering the Development Agenda, copyright and traditional knowledge, plus additional information meetings and seminars. Librarians from developing and transition countries have been part of the library delegations, including in 2005 the first librarian from Africa to make an intervention. Over 30 formal statements and interventions have been made to inform member state delegations about the role of libraries in the information society and in economic and social development, the role of copyright in the provision of library services, how over-restrictive copyright laws can erode access to knowledge and can impede development, and why the current "one size fits all" approach is unjust and inequitable. A Development Agenda that takes into account the needs and stage of development of a country is crucial to libraries and their users, because access to learning and knowledge is a vital tool for economic, social and intellectual development.

During negotiations, libraries stressed that technical assistance to national policy makers and capacity building should be development oriented and involve all stakeholders, including libraries, and should promote the use of options and flexibilities; that WIPO has a role in nurturing the public domain, part of our global cultural and intellectual heritage; that WIPO should consider alternative models that support creativity and innovation such as open access to research material, and a treaty on access to knowledge. The particularly contentious issues that arose between developing countries and the industrialised, rich countries were the inclusion of access to knowledge, copyright exceptions and limitations and whether the preservation of the public domain within the scope of WIPO – all the issues that affect libraries.

Recommendations for a Development Agenda, of particular interest to libraries are:

- Cluster A: Technical Assistance and Capacity Building (Recommendations 5, 8, 10)
- Cluster B: Norm-setting, flexibilities, public policy and public domain (Recommendations 16, 19, 20, 21, 22, 23)
- Cluster C: Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge (Recommendations 24, 25, 26)
- Cluster D: Assessment, Evaluation and Impact Studies (Recommendations 33, 35)
- Cluster E: Institutional Matters including Mandate and Governance (Recommendation 42)
- Cluster F: Other Issues (Recommendation 45).

The purpose of the Development Agenda is to effect change, so adoption of the Recommendations for a Development Agenda is the start of a process. The Development Agenda needs to be implemented in all WIPO committees and activities, and should result in a greater understanding of the importance of flexibilities, especially for developing and least-developed countries, and balanced IP education to include copyright exceptions and limitations, library copyright issues, the public domain, fair model laws and pro-competitive licensing regimes.

The library role is to monitor progress to help ensure that the Recommendations are implemented in a meaningful way, and in the spirit intended by member states. While the thematic project approach transforms specific Recommendations into concrete actions, it is important that the Development Agenda does not break down into a series of discrete projects and that the overarching original aim, to re-orient and re-balance WIPO, is kept at the fore.

A related concern is that proposed activities should genuinely reflect a change in direction, rather than an enhanced emphasis on objectives that WIPO has traditionally promoted. Activities focused primarily on IP protections and IP culture, for example, are not necessarily development-oriented. Also, there is little evidence that the placement of the adjective "development" in project descriptions will result in the kind of change needed, and envisaged by member states who adopted the Development Agenda.

The change of atmosphere brought about by the Development Agenda has influenced the work of other WIPO committees, including the Standing Committee on Copyright and Related Rights (SCCR). SCCR has a new agenda item "Exceptions and Limitations" and is undertaking substantive work including the publication of detailed studies on exceptions and limitations, and consideration of a proposal for a WIPO Treaty for Blind, Visually Impaired and other Reading Disabled Persons. The library community will attend SCCR and meetings of the Committee on Development and Intellectual Property (CDIP) to monitor progress of the Development Agenda, highlight concerns and put forward constructive suggestions and ideas to member states and the WIPO Secretariat. We believe that libraries everywhere will benefit from a Development Agenda for WIPO, because access to knowledge is not just an issue for developing countries, but also for developed countries since knowledge is a universal tool and equal access is important for all.

## **Library position statements**

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*Revised October 2009*

## **NATIONAL POLICY MAKING: ADVOCATING FOR FAIR COPYRIGHT LAWS**

### **International v. national policy making**

Most national copyright laws are based on international copyright treaties. This means that when a state signs an international treaty, it commits itself to internationally binding obligations, as set out in the text of the treaty. The majority of countries, including developing countries, are probably bound by two main treaties:

- 162 countries have joined the Berne Convention<sup>xlv</sup>, the bedrock of international copyright law. Some countries, such as Norway joined as early at 1896 and others, such as the US, as recently as 1989;
- 149 countries have joined the World Trade Organization (WTO) which means that they are bound by the 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights, known as TRIPS<sup>xlvi</sup>. Three quarters of WTO members are developing or least-developed countries, the latter have an implementation deadline of July 2013.

Some countries have taken on extra responsibilities, in particular developing and transition countries. Of the sixty states that have joined the WIPO Copyright Treaty (WCT) since 2002, fifty-three are developing or transition countries. Some countries entering into bi-lateral trade agreements may also be required to join the WCT as part of the "package". (See Copyright and Trade Agreements).

Any new treaty obligation typically requires the state to amend their copyright law. This means that many countries, especially developing and transition countries, are in the process of amending their copyright laws. International treaties usually contain a degree of flexibility as to how the provisions should be implemented so that different national legal traditions are taken into account. Librarians must ensure that any flexibilities in copyright are availed of when the law is being implemented nationally.

### **Librarians as stakeholders**

Copyright law regulates the ownership, control and distribution of information and knowledge goods. Libraries enable people to find, access and use information and knowledge. Copyright is therefore a major concern to libraries because it governs the core library business.

Copyright law directly affects library services providing access to learning resources, scientific and research information, critical to education and training in every country. Librarians and their representative organisations, are important stakeholders in any national debate and must be consulted when the law on copyright, related rights or enforcement is being discussed. This means that library representatives should maintain regular contact with government copyright officials and should be kept informed of any national developments. Librarians can submit position papers, attend hearings and put forward suggestions for amendments.

In particular, librarians should ensure that:

- exceptions and limitations are sufficient to meet the needs of a modern information service and learning environment;
- existing exceptions and limitations are extended to the digital environment and new exceptions appropriate for the new digital opportunities are introduced;
- the public domain is protected from encroachment;

- new rights on digital information are resisted;
- technological protection measures do not hinder libraries from availing of lawful exceptions or from preserving our global cultural heritage;
- contract terms in licences cannot override statutory copyright exceptions.

### **Librarians as advisors**

Everyday librarians are managing information and responding to requests from students, academics and members of the public. Librarians work at the interface between information and technology, and have acquired a sound understanding of the realities and implications of the knowledge society. As well as copyright, they can provide practical advice to policy makers on related issues e.g. open access publishing, orphaned works and other issues arising from the changing information landscape.

### **Librarians as allies**

Networking and co-operation is an integral part of a librarian's work. Forming strategic allies with other like-minded groups to achieve common goals is an aid to success. Examples of other sectors are academia and education, disability groups, consumers, digital civil liberties, free software advocates. There may be others, depending on the issue.

Support is also available from the international library community. The IFLA Committee on Copyright and other Legal Matters (CLM) has members from almost twenty countries. Members of the consortium, Electronic Information for Libraries, can avail of advice through its copyright programme. The national library association, or that of a neighbouring country, may have expertise to share.

### **Library position statements**

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