

1 November 2011

The Hon Robert McClelland MP
Attorney-General
Attorney-General's Department
Central Office
3-5 National Circuit
BARTON ACT 2600

By email: r.mcclelland.mp@aph.gov.au

Dear Attorney General

WIPO FOCUS ON UPDATING EXCEPTIONS AND LIMITATIONS FOR LIBRARIES

We are thrilled that the 23rd meeting of the Standing Committee on Copyright and Related Rights (SCCR) of the World Intellectual Property Organisation (WIPO) in November is to dedicate three days to discussions regarding the updating of copyright exceptions and limitations for libraries worldwide.

We have written to Ms Toni Pirani, the Australian government representative attending the SCCR meeting. We are also writing to you directly, to bring to your attention the issues currently facing libraries in Australia.

Current exceptions and limitations available to libraries in Australia

Libraries have historically been regarded by Australian policymakers as institutions vital to the dissemination of knowledge and advancement of learning. A number of national policies have served to protect the functions of libraries from the proprietary impulse of copyright.

The Australian copyright regime currently provides exceptions for a number of library activities including the copying of materials for library users, copying of material for preservation purposes, inter library lending and parallel importation of books.

While supporting a range of long standing library services, these exceptions could not have envisaged the explosion of information platforms and public access to knowledge facilitated by the internet. Access to digital information, including the digitisation of library collections, licensing of digital content and capturing of new-media content have become high priorities for 21st century libraries in Australia. The existing exceptions and limitations provided for libraries under the Copyright Act must be updated for libraries to remain relevant in the digital age.

An international instrument updating exceptions for libraries

The SCCR intends to contribute text-based work on updated limitations and exceptions for libraries, archives, educational, teaching and research institutions, as well as persons with print and other disabilities, to an international instrument with a view to making recommendations to the WIPO General Assembly in June 2012. The Australian government input into discussions at the November meeting will shape the aspirations and content of this international instrument.

IFLA Draft Treaty on Copyright Exceptions and Limitations for Libraries and Archives

In support of the SCCR's text-based work, the International Federation of Library Associations and Institutions (IFLA) produced a draft treaty to guide WIPO Member States in their discussions. A copy of the draft treaty can be viewed at <http://www.ifla.org/files/clm/publications/tlib.pdf>. The African Group has also prepared a draft instrument incorporating updated exceptions for libraries available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_12.pdf.

You will notice that several draft articles proposed by IFLA promote exceptions that are already provided for under Australian domestic law. The Australian Digital Alliance and Australian Libraries Copyright Committee generally endorse the principles contained in those draft articles which are reflected in the Australian copyright regime.

IFLA's draft treaty advocates a similar standard of copyright exceptions and limitations available in Australia for libraries globally, while extending their ability to function in the digital age.

Updating exceptions for Libraries in Australia

The biggest issue facing libraries in Australia is their ability to provide users with access to digital content without risking infringement of copyright. Libraries are increasingly becoming facilitators of access to information online through licences with digital content providers. These licences are coming into conflict with the traditional functions of libraries, and overriding exceptions otherwise available to them under the copyright regime. **Attachment A** provides you with an understanding of some of the key issues faced by libraries in Australia which are reflected in the following articles of the IFLA draft treaty instrument:

- **Right to access retracted and withdrawn works published in databases and on websites** (Article 12);
- **Obligation to respect exceptions to copyright and related rights** (Article 14)¹;
- **Obligations concerning Technological Protection Measures** (Article 15)²; and
- **Right to use of orphan works** (Article 13)³.

The draft treaty instrument circulated by IFLA provides an excellent starting point for discussions by the SCCR regarding the updating of exceptions and limitations for libraries globally. We hope that the brief summary of important exceptions attached to this letter assist you in understanding the issues facing libraries in Australia.

Ellen Broad, Copyright Adviser for the ADA and ALCC and a representative from the library sector will be meeting with Ms Toni Pirani next week to discuss these issues further. If you have any further queries, you can contact Ellen on (02) 6262 1273 or at ebroad@nla.gov.au.

Yours sincerely,



Professor Tom Cochrane
Chairman
Australian Libraries Copyright Committee



Derek Whitehead OAM
Chairman
Australian Digital Alliance

¹ Article 19, African Group draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives

² Article 18 African Group draft treaty

³ Article 21, African Group draft treaty

About the Australian Libraries Copyright Committee (ALCC)

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee which represents the following organisations:

- Australian Library and Information Association
- Australian Government Libraries Information Network
- Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia

About the Australian Digital Alliance (ADA)

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that balances the interests of rights holders with the interests of users of copyright material.

ATTACHMENT A

KEY EXCEPTIONS PROVIDED IN IFLA TREATY INSTRUMENT

Right to Access Retracted and Withdrawn Works Published in Databases and on Websites (Article 12)

Libraries are recognised as having a responsibility to preserve a permanent historic record of works published in their country. The function of the National Library of Australia, for example, is to maintain and develop a national collection of library material, including a comprehensive collection of library material relating to Australia and the Australian people⁴.

Libraries in Australia subscribe to a range of publications including scholarly journals, newsletters and magazines for the benefit of users and to build a comprehensive collection of library material. Unlike traditional print subscriptions, where a physical copy of each publication is deposited in the library's collection for posterity, a number of digital subscriptions, particularly scholarly journals, now carry an expiration date for archived content. After a certain period of time (e.g. 2 years), articles are withdrawn from a database, frustrating libraries' efforts to preserve a comprehensive historic record of works. This time limit is a condition of the contract libraries enter into with digital content providers. There is currently no provision in the Copyright Act to prevent contracting out of exceptions and limitations otherwise available to libraries.

Libraries acknowledge that retraction or removal of articles may occur where there are findings of inaccurate data, infringement of ethical codes or due to limitations on the publisher or copyright holder. Libraries maintain that they have a role to preserve these retracted works and provide information for researchers in accordance with best practise⁵.

Obligation to Respect Exceptions to Copyright and Related Rights (Article 14)

A substantial number of licence agreements between Australian libraries and providers of copyright electronic content contain terms and conditions which purport to override or modify copyright exceptions. These include:

- restrictions on users printing, downloading, or emailing copies of the resource — overriding s. 40 (fair dealing for research or study);
- restrictions on libraries performing Inter-Library Loan/Document Supply — overriding ss 49 and 50 (reproducing and communicating works by libraries and archives for users & reproducing and communicating works by libraries or archives for other libraries or archives);
- restrictions on libraries copying the work for preservation purposes under section 51A.
- restrictions on libraries networking the resource across the premises of the library subject to certain conditions — overriding s. 49(5A)⁶.

In 2002 the Copyright Law Review Committee, inquiring into the relationship between copyright and contract at the request of the Attorney-General, recommended that the Copyright Act be amended to provide that an agreement, or provision of an agreement, that excludes or modifies

⁴ Section 6(a), *National Library Act 1960* (Cth)

⁵ One example of best practice relating to retracted works has been developed by the U.S. National Library of Medicine, and can be viewed at: <http://www.nlm.nih.gov/pubs/factsheets/errata.html>

⁶ Australian Digital Alliance/ Australian Libraries Copyright Submission to Copyright Law Review Committee on Copyright And Contract (2002)

the exceptions and limitations available to libraries under the Copyright Act have no effect⁷. Their recommendation has not yet been implemented in Australian copyright law, and remains a significant issue for libraries entering into licence arrangements with digital content providers.

Obligations Concerning Technological Protection Measures (TPS) (Article 15)

Libraries in Australia are permitted to circumvent TPMs under the Copyright Act for the purpose of making an acquisition decision⁸, and for certain prescribed acts necessary to carry out their functions⁹.

Licences with digital content providers often attach TPMs which restrict library functions otherwise permitted under the Copyright Act. One example is the technology that 'locks' electronic documents provided by the library via a licence to users to prevent them from being copied. This condition of a licence with copyright content providers overrides section 40 of the Copyright Act allowing copying for research and study.

Right to Use of Orphan Works (Article 13)

The issues facing libraries seeking to provide access to orphan works are well known. As Australia prepares for the roll out of the National Broadband Network, the pressure on libraries, archives and cultural institutions to provide access to digital content is increasing¹⁰.

In Australia, section 200AB of the Copyright Act can assist libraries seeking to provide access to orphan works. It allows the use of copyright material for certain "special" purposes that would 'benefit the broader Australian community'¹¹. In practice, uncertainties as to definitions of "non-commercial" use and "special case" have meant that libraries are reluctant to risk copyright infringement to provide public access to orphan works.

Without section 200AB being used to its full potential, other interests are beginning to circulate their own models for dealings with orphan works, including statutory and commercial licensing. We fear that as expectations on libraries to provide access to digital content increase, a licensing model may appear to be the only way to avoid perceived risks in using section 200AB. We stress that a licensing model is not the appropriate solution to the orphan works problem.

We acknowledge that as it is presently drafted, Article 13 of the IFLA treaty instrument is wide reaching and does not articulate the complexities involved in using orphan works. We ask that you view it as a statement of aspiration, and clear indication of the need for WIPO member states to provide leadership and clarity on issues regarding the use of orphan works.

⁷ Copyright Law Review Committee, *Copyright and Contract* (2002), 274 – namely ss. 48A, 49, 50, 51A, 183 and Part VB.

⁸ Section 116AN *Copyright Act 1968* (Cth)

⁹ Section 132APC(9) ref. Sch. 10A *Copyright Regulations 1969* (Cth) – i.e interlibrary loan, copying for users

¹⁰ i.e. The National Cultural Policy discussion paper released by the Minister for the Arts in August this year reflects access online to cultural heritage collections facilitated by the NBN:

<http://culture.arts.gov.au/discussion-paper>

¹¹ Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 109