

## Copyright - How to Stay Legal

*Paul Pedley*



**Contacts:**

Free Pint Limited  
4-6 Station Approach  
Ashford, Middlesex  
TW15 2QN, UK  
T: 0870 141 7474  
I: +44 870 141 7474  
F: +44 (0)1784 420033

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**Disclaimer**

Paul Pedley is not a lawyer and is not able to give legal advice. The contents of this document do not constitute legal advice and should not be relied upon in that way.

## Copyright – How to Stay Legal

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### Biographical Note

Paul Pedley is Head of Research at the Economist Intelligence Unit, and has previously worked in the information departments of a law firm, property developer and in a number of government departments.

Paul is a Fellow of CILIP, represents Aslib on the Libraries and Archives Copyright Alliance; and is also on the steering group of the JISC legal information service.

He regularly runs training courses on copyright, data protection and freedom of information; as well as on internet topics such as the invisible web, and business information on the internet.

Paul is the author of "Essential law for information professionals", and is currently editing a book entitled "Managing digital rights: a practitioner's guide", both of which are published by Facet Publishing [www.facetpublishing.co.uk](http://www.facetpublishing.co.uk).

He is also the author of four Aslib publications (available from Taylor & Francis [www.tandf.co.uk](http://www.tandf.co.uk)):

- Copyright for library and information service professionals
- Intranets and push technology – creating an information sharing environment
- The invisible web: searching the hidden parts of the internet
- Free business and industry information on the web

and has also contributed to the "Handbook of information management" and the 3rd edition of "Copyright made easier".

He has written a number of other reports for FreePint which are available through [www.freepint.com/shop/report](http://www.freepint.com/shop/report)

- Copyright and the internet: myth and reality
- Practical guide to negotiating licenses for electronic products
- Data protection for websites and intranets
- An introduction to freedom of information

Paul maintains an information law weblog at [www.KeepingLegal.com](http://www.KeepingLegal.com) which is accompanied by a regular newsletter.

### Abbreviations

BHB	British Horseracing Board
BL	British Library
CCC	Copyright Clearance Center
CDPA	Copyright Designs and Patents Act
CILIP	Chartered Institute of Library and Information Professionals
CLA	Copyright Licensing Agency
CLARCS	Copyright Licensing Agency's Rapid Clearance Service
CVCP	Committee of Vice Chancellors and Principals
ECJ	European Court of Justice
HMSO	Her Majesty's Stationery Office
LACA	Libraries & Archives Copyright Alliance
NLA	Newspaper Licensing Agency
OS	Ordnance Survey
UUK	Universities UK
WATCH	Writers, Artists and their Copyright Holders

### Introduction

This guide covers how to be copyright compliant. It should, hopefully, be relevant to anyone who copies material and who needs to be sure that what they are doing is permitted under the law. It is, however, written specifically from the perspective of an information professional. Library and information professionals take a particular interest in copyright matters, because they find themselves placed in the difficult position of being asked on the one hand by their users to provide access to content whilst on the other hand needing to be mindful of the legal rights of the creators and distributors of intellectual property.

For the vast majority of people, copyright is not a subject that they wish to study as an academic discipline or as an area that is of interest merely for its own sake. Rather, they simply wish to be able to copy material and want to be able to do so in both the knowledge and with the confidence that what they are doing is within the law.

Copyright law is extremely complex, and it feels as though you need a lawyer with you to be able to say with any degree of certainty whether something is allowed under the law; or whether it would constitute copyright infringement.

Consulting a copy of the legislation to see what the law on copyright actually says is not as easy or as straightforward as it ought to be. Whilst one can quickly consult a copy of the Copyright Designs and Patents Act 1988 on the HMSO website, that will not be of much use. The CDPA 1988 has been significantly amended over the years since it was published – it has been amended by the Broadcasting Acts of 1990 and 1996; the Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002; and the Copyright (Visually Impaired Persons) Act 2002 as well as by secondary legislation – the statutory instruments which interpret and modify it. The Copyright and Related Rights Regulations 2003 are the most significant item of subsidiary legislation to amend the CDPA 1988.

It is also important to recognise that in England & Wales our laws are not made up solely on the basis of statute law. Case law has a crucial role to play in helping us to understand how the legislation applies in a particular set of circumstances.

This brief guide to copyright compliance cannot give you black and white statements which will apply in all circumstances. Rather, it tries instead to think through the process of deciding whether an act of copying is legal or not; and to highlight any areas of particular risk.

### Copyright compliance is both a legal and an ethical issue

Respecting either the copyright or any other intellectual property rights of a creator is not simply a question of obeying the law. In addition to being a legal requirement, it is also an ethical issue. CILIP, the professional body for information staff have produced an updated code of professional practice. Entitled "Ethical principles and code of professional practice for library and information professionals" ([http://www.cilip.org.uk/professional\\_guidance/ethics/](http://www.cilip.org.uk/professional_guidance/ethics/)), the code states that

"The conduct of members should be characterised by .... respect for, and understanding of, the integrity of information items and for the intellectual effort of those who created them"

It goes on to say that "Members should ....defend the legitimate needs and interests of information users, while upholding the moral and legal rights of the creators and distributors of intellectual property".

### Policing acts of copying

Copyright is in place to protect commercial interests, it is not there solely to catch people copying illegally in libraries. Information professionals are not the "copyright police", acting on behalf of rights holders, but we do have to be seen to be obeying the law and not prejudicing people's livelihoods.

The Copyright Licensing Agency's guidance on their sticker scheme which is designed for walk in users of public libraries says that

"librarians are not required to monitor private copying or police the use of the Sticker Scheme. It is for each patron at a self-service copier to decide whether or not their copying is for commercial purposes and, if so, whether to ask you for a Sticker".

There is no single organisation which is likely to patrol the library in order to make sure that information professionals and

their users are keeping on the right side of the law. However, the collective licensing societies do act against infringers. For example, the Copyright Licensing Agency has a Compliance Unit which investigates the unauthorised copying of books, journals and magazines by business, education and government, and where appropriate, takes legal action in conjunction with authors and publishers. Where necessary, they have been known to employ private investigators in order to verify whether the copying being undertaken is infringing.

Through its Copywatch initiative and website, CLA is offering rewards of up to £20,000 for reliable information about illegal photocopying or scanning leading to a successful licensing outcome or to a legal action in the corporate sector.

CLA's annual review for 2003 says:

CLA's view is that those organisations which are licensed are assumed to be generally compliant, and that if they commit an infringement – unless it is blatant or on a large scale – the matter will be dealt with through dialogue and agreement. However, unlicensed organisations, especially if they have refused to take out a licence when offered, or have delayed unreasonably in doing so, are not regarded in a favourable light. CLA's Copyright Compliance Unit was established under the leadership of a former detective chief inspector of police in order to tackle the problem of consistently non-compliant organisations.

The narrowing of the 'fair dealing' exception from 31 October 2003 all but eliminated the possibility that commercial organisations copying copyright materials without the rightsholders' permission, or a CLA licence, are doing so legally. Hence, 2003 saw the implementation of a compliance initiative, focussed on the corporate sector, which targeted unlicensed companies suspected of copyright infringement. This strategy ran parallel to the Copywatch 2003 marketing campaign aimed at encouraging whistleblowers from targeted companies. The campaign will continue into 2004 so corporations that defend their own rights assiduously but see no need to take out a CLA

copyright licence may find it timely to reconsider”.

There are a number of organisations which exist on behalf of the rights holders in order to protect their interests against piracy and illegal copying. These include:

- the Federation Against Software Theft (<http://www.fast.org.uk>) which was set up in 1984 by the British Computer Society copyright committee
- the Business Software Alliance (<http://www.bsa.org>) which claims to be the voice of the world's commercial software industry and to educate consumers on software management and copyright protection, cyber security, trade, e-commerce and other internet related issues
- Anti copying in Design (<http://www.acid.uk.com>). Created in 1996 by designers to combat the growing threats of plagiarism in the design and creative industries.
- Federation Against Copyright Theft (<http://www.fact-uk.org.uk>). Formed in 1984 to combat counterfeiting, piracy, and misuse of its members products.

The European Commission have recently issued a directive - 2004/48/EC of 29th April 2004 - on the enforcement of intellectual property rights (in OJL 195/16 of 2nd June 2004). The Directive covers the enforcement of intellectual and industrial property rights, including copyright and related rights, trademarks, designs and patents. It requires all Member States to apply effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy and so create a level playing field for rights holders in the EU. Member states are required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 29 April 2006.

Remedies available to rights holders in the directive are the destruction, recall or permanent removal from the market of illegal goods, as well as financial compensation, injunctions and damages. There is a right of information allowing judges to order certain persons to reveal the names and addresses of those involved in distributing the illegal goods or services, along with details of the quantities and prices involved.

### Why is there so much legal uncertainty?

It is not easy to try and interpret how copyright law applies in a specific set of circumstances, and there are several reasons for this.

One reason relates to the role of case law in the legal system of England & Wales. Reported cases present specific problems out of which a point of law is extracted. Formulation of the law is bottom up from a specific event to a general principle. The point of law is known as a precedent and it is binding on other courts which are at the same or a lower level in the hierarchy. The same decision must result from another situation in which the relevant facts are the same. The law evolves by means of opinion changing as to which facts are relevant, and by novel situations arising.

Often you can only be sure that something is on the right side of the law when a judge says that it is in court, which is a little bit late in the day. Because there is so much legal uncertainty, copyright issues are really a question of working out how best to minimise the risk of legal action being taken against you.

The second reason for there being so much legal uncertainty is that key words and phrases appearing in the CDPA 1988 are not defined; and in many cases this is quite deliberate. Undefined terms include:

- original
- substantial
- reasonable
- fair dealing
- copying for a commercial purpose

#### Original

Section 1 of the CDPA 1988 says that “Copyright subsists in **original** literary, dramatic, musical or artistic works”. The word “original” is not defined in the Act, but various judges have considered the requirements of originality and they have said that for a work to be original it must be the result of the expenditure by the author of skill, judgment and experience, or labour, skill and capital

#### Substantial (and substantially)

“Substantial” could be qualitative as well as quantitative

Reasonable (and reasonably)

In section 39 of the CDPA 1988 which deals with copying of published works by librarians, it requires "that no person is furnished with more than one copy of the same material or with a copy of more than a reasonable proportion of any work"

Whilst this is not set out in the legislation, the generally agreed safe copying limit for a published work is considered to be one chapter or 5% of extracts.

Fair dealing

The CDPA 1988 contains three fair dealing exceptions. They are:

- fair dealing for the purposes of non commercial research or private study
- news reporting
- criticism or review

The Act does not define what constitutes "fair dealing". It does, however, give us some pointers as to what would not be classed as fair dealing. With regard to fair dealing for the purposes of non commercial research or private study,

Copying by a person other than the researcher or student himself is not fair dealing if

- in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or
- in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.

It is not fair dealing

- to convert a computer program expressed in a low level language into a version expressed in a higher level language, or
- incidentally in the course of so converting the program, to copy it, (these being acts permitted if done in accordance with section 50B - decompilation).

- It is not fair dealing to observe, study or test the functioning of a computer program in order to determine the ideas and principles which underlie any element of the program (these acts being permitted if done in accordance with section 50BA - observing, studying and testing).

Commercial purpose

- Copying for a "commercial purpose" is not defined in the legislation. The Patent Office took the view that they cannot define what is copying for a commercial purpose because it is ultimately the European Court of Justice who have the final say; and, in any case, if the Intellectual Property & Innovation Directorate at the Patent Office were to try to define it, it may well result in less flexibility for libraries and researchers
- The test is whether the research is for a commercial purpose, not whether it is done by a commercial body. The key factor is therefore the purpose for which the copying is done.
- The law cannot expect you to do more than decide what is the case on the day you ask for the copy – this could be relevant when the commercial purpose is as yet unknown or undefined. If there is no commercial purpose on the day the copy is requested then it would seem reasonable to sign the declaration as non-commercial.
- Some research in a commercial environment could be classed as non-commercial if the purpose is entirely unconnected with the employer's commercial objectives, but such cases will be very rare

In CDPA s178, a section of minor definitions, the definition of "private study" says that private study does not include any study which is **directly or indirectly** for a commercial purpose".

For further information on what would constitute copying for a commercial purpose it is worth looking at the BL/CLA joint guidance note entitled "Changes to UK copyright law: a joint note from the British Library and The Copyright Licensing Agency" <http://www.cla.co.uk/directive/BL-CLA-FAQ.doc>; and also at the scenarios set out by Charles Oppenheim [http://www.managinginformation.com/copyright\\_difficulties2.htm](http://www.managinginformation.com/copyright_difficulties2.htm).

### Terminology used in the Database Regulations

It is also worth looking at the Database Regulations (SI 1997/3032), and the undefined words and phrases within those regulations.

The Database Regulations introduced a new *sui generis* right to prevent extraction and re-utilisation of all or a substantial part of a database. According to the Regulations, the definition of a database is :

“a collection of independent works, data or other materials which:  
a) are arranged in a systematic or methodical way &  
b) are individually accessible by electronic or other means”

The statement that the Regulations relate to material which is accessible by electronic or other means shows that a “database” could be either electronic or hard-copy. The definition of “database” would encompass many websites, as well as collections of data in the form of directories, encyclopaedias, statistical databases, online collections of journals and multimedia collections.

The case of *British Horseracing Board Ltd and others v William Hill Organization Ltd* is all about how the Database Regulations (SI 1997/3032) should be interpreted. When the case reached the Court of Appeal, the judge referred a series of questions to the ECJ (Case C-203/02) and asked for a ruling on the meaning of the key terms in the Regulations, which in turn implemented directive 96/9/EEC on the legal protection of databases. The Opinion of Advocate General Stix-Hackl was delivered on 8th June 2004 and is available from the website of The Court of Justice of the European Communities <http://curia.eu.int>. It helps to shed light on the meaning of those key words and phrases.

On a number of occasions in the judgment, the Advocate General states that many of the issues are not matters for the ECJ to give a ruling on, but are instead for the national court; and that the Court of Justice must confine itself to interpreting Community law.

### Substantial

One of the points that people raise about databases is that it is not possible to see the size of a database, in the same way as you can see the length of a book or a journal article; and that as such it is impossible to tell whether a substantial part of the database has been copied.

Fair dealing with a database is not solely to be judged on the basis of quantity, because quality must also be taken into account.

“The quantitative alternative must be understood as requiring the amount of the part of the database affected by the prohibited act to be determined. That raises the question whether this must be assessed in relative or absolute terms. In other words whether a comparison must be made of the amount in question with the whole of the contents of the database or whether the affected part is to be assessed in itself”.

“In that connection, it must be observed that a *relative assessment would tend to disadvantage the makers of large databases because the larger the total amount the less substantial the affected part. However, in such a case, a qualitative assessment undertaken at the same time could balance out the equation where a relatively small affected part could none the less be considered substantial in terms of quality.....* On that basis even a part which was small in relative terms could be considered substantial because of its absolute size”.

“In a qualitative assessment, technical or economic value is relevant. Examples of valuable characteristics of lists in the field of sport would be completeness and accuracy”.

The economic value can be assessed in terms of what the wrongdoer – the person extracting or reutilizing the data – has saved.

A part may be substantial in quantitative and qualitative terms. There is no legal definition in the directive of the point at which a part becomes substantial. Indeed, the directive deliberately didn't define the word “substantial”.

Insubstantial parts

The expression “insubstantial parts” of the contents of the database is not legally defined, but the Advocate General tries to set out what it covers. For something to be an “insubstantial part”, the upper bar doesn’t reach the threshold for substantial while there is also a lower bar, namely that it doesn’t cover individual data.

Extraction

The legal definition of “Extraction” in article 7(2)(a) is the transfer of the contents of the database to another medium, such transfer being either permanent or temporary. It covers not only the transfer to a data medium of the same type but also to one of another type. That means that merely printing out data falls within the definition of “extraction”.

“Extraction” clearly cannot be construed as meaning that the extracted parts must then no longer be in the database if the prohibition is to take effect. Nor, however, must “extraction” be so widely construed as also to cover indirect transfer. Direct transfer to another data medium is required. In contrast to “re-utilisation” it does not require any public element. Private transfer is also sufficient.

Re-utilisation

The term “re-utilisation” in article 7 of the directive covers not only the making available to the public of the contents of the database directly from the database, but also the making available to the public of works, data or other materials which are derived indirectly from the database, without having access to the database.

Re-utilisation involves making data publicly available. The judgment says that the protection against re-utilisation was to cover acts by non-commercial users too. Public lending is not an act of re-utilisation.

Prohibition of extraction laid down in the directive presupposes knowledge of the database. That is not necessarily the case as regards re-utilisation.

Unlike extraction, “re-utilisation” also covers indirect means of obtaining the contents of a database. The defining element “transfer” must therefore be interpreted widely.

Obtaining

The expression “obtaining” in article 7(1) of the directive must be interpreted as

meaning that it also covers data created by the maker if the creation of the data took place at the same time as its processing and was inseparable from it.

Exhaustion

Database right is exhausted only under certain conditions, and one of those conditions is described as “the first sale of a copy of a database”. That suggests that there can be exhaustion of the right only in respect of such physical objects.

Systematic

There is a repeated and systematic act when it is carried out at regular intervals, for example, weekly or monthly.

**Is your copying authorized?**

Authorization is needed for any copying of material protected by copyright or database right. There are four main forms of authorization:

- a) statute
- b) permission
- c) contract or
- d) licence

**a) statute**

Is the copying authorized by one of the permitted acts or copyright exceptions? In order to answer this question you need to consider the purpose of the copying. For example, if the purpose of the copying is:

- for private study
- for research for a non-commercial purpose
- to criticize another’s work
- to review another’s work
- for instruction
- for examination
- for parliamentary or judicial proceedings
- for those with a visual impairment

then it may possibly be authorised by one of the statutory exceptions.

The Berne Convention of 1886 enabled national legislatures to provide a number of copyright exceptions or permitted acts, so long as they met a three step test:

1. only applied in certain cases
2. do not conflict with a normal

exploitation of the work or other subject matter  
3. do not unreasonably prejudice the legitimate interests of the rights holder

The Copyright Directive (2001/29/EC) uses a similar form of words, and therefore any of the permitted acts or copyright exceptions appearing in the CDPA 1988 are required to fulfil the Berne 3-step test.

In effect, the permitted acts or copyright exceptions make it possible for users of copyright works to be able to undertake a limited amount of copying without having to get the permission of the copyright owner, so long as the copying is done under the conditions set out in the legislation. *The permitted acts are, by definition, a lawful use of a work even though they have not been authorized by the publisher.* They provide an invaluable counterbalance to the rights holder's exclusive rights in the wider interests of research, scholarship and culture.

If you are sure that your copying is authorized by the exception covering copying for the purposes of research for a non-commercial purpose or private study, you will also need to ensure that the copying stays within the agreed safe copying limits which are:

- one article from any one issue of a journal or periodical
- one chapter or 5% of extracts from a book

In addition, remember that

- Digital copies must not be placed on a network
- Unless it is impracticable, you must acknowledge all copies

To be able to say that your copying is fair or reasonable, you would really need to be able to answer NO to each of the following questions

- Am I copying in order to profit by it, whether directly or indirectly?
- Am I copying in order to avoid buying a copy of the work?
- Am I making multiple copies of the item?
- Are my colleagues copying substantially the same material at substantially the same time and for

substantially the same purpose?

- Am I damaging the integrity of the work being by the way in which I am copying it?

#### **b) permission**

One obvious way of legitimising any copying is to get the direct permission of the rights holder. In order for permission to be granted you will need to provide them with as much information as possible about what it is you want to copy and what it will be used for. The request should therefore contain details of

- Author and title of the extract you wish to reproduce
- Author and title of the publication in which the extract appears
- Page range
- Publisher's name
- Date of Publication (plus volume and issue numbers for journals)
- ISBN or ISSN
- Number of copies to be made

If you are going to be requesting copyright clearance from rights holders on a regular basis you should consider developing a standard form for this purpose. There is an example of a standard form for permission seeking on page 73 of Sandy Norman's book "Practical copyright for information professionals: the CLIP handbook" published by Facet Publishing, 2004. ISBN 1856044904

#### **Identifying and tracing the rights holder**

Copyright is an automatic right. There is no formal process which a creator has to go through before copyright is granted. The consequence of this is that no comprehensive register exists in order to locate the creator or rights holder in a work in order to seek their explicit permission to copy material.

Having said that, there is a database known as WATCH – Writers Artists and Their Copyright Holders – <http://tyler.hrc.utexas.edu/>. It contains primarily the names and addresses of copyright holders or contact persons for authors and artists whose archives are housed, in whole or in part, in libraries and archives in North America and the United Kingdom. The objective in making the

database available is to provide information to scholars about whom to contact for permission to publish text and images that still enjoy copyright protection.

You will need to consider who owns or controls the rights in the material. This could be:

- The creator of the material or his/her heirs, or
- The creator's employer, or
- Anyone else to whom the rights in the material have been sold, or otherwise transferred or licensed, or
- A collective licensing society which has been asked to collect fees on behalf of the rights holder

For a work that has been commercially published, the starting point for permission seeking would be the publisher. If, for whatever reason, they are not the rights holder, then the next step would be to try and locate the author.

In order to trace the rights holder the people and places to check would be:

- The publisher
- The principal author
- Biographers of the author
- Directories of authors & publishers
- Publisher / author societies (such as the Publishers Licensing Society or the Authors' Licensing and Collecting Society)
- Place an advertisement in a relevant journal

If the creator or owner of the rights in a work died less than seventy years ago, the rights in that work will have transferred to someone else. This could either be through a will or through inheritance. In the case of a will (or testamentary deposition), the will would indicate to whom the rights in the material have been given. However, if there was no will, or if the creator of the work has not specified where the rights in the material should go, then the normal rules of inheritance apply.

When a company goes out of business or ceases trading, any copyright it may own continues for the normal period of copyright duration. The rights are part of the assets of the company, and may be sold or otherwise dealt with by the company or its liquidator.

You are required to make every "reasonable" effort in order to trace the rights holder; and you should keep good records of your efforts. If you are challenged about the copying you have done, this will help to show that you were acting in good faith and that you made reasonable efforts to try and track down the rights holder.

But if, after going through each of the steps above, you are still unable to trace the rights holder, the question arises as to whether or not you should go ahead and copy the content. If you do decide to publish in such circumstances, then you should include a statement that every reasonable effort has been made to contact the rights holder, but that you have failed to do so, and then invite any legitimate rights holder to contact you.

The real questions are : Are you willing to take the risk? and What is the likelihood of legal action?

I have heard one apocryphal story which relates to a book that was published a long time ago, whose author had died some years before, and where the book was subsequently serialised on the radio. A number of listeners enjoyed the serialisation of the book so much that they went out and tried to buy a copy only to find that it was out of print. An enterprising publisher therefore decided that he would publish the work in order to meet the demand. No sooner had he done so than the man who was responsible for the drawings in the original book – which had been copied for the new printing of the book - got in touch to ask for payment by the publisher for use of his work. This story illustrates that there are situations where a claim could be made by a rights holder, even when it seems most unlikely. It also demonstrates very well that there are a number of rights that protect a work and not just one right, and it is important not to forget that.

If you do decide that it is worth taking the risk, you may wish to set aside an appropriate fee for the use of the work which you then put into a special bank account, because you have to bear in mind that if the rights holder does appear they will be likely to expect some form of payment. Indeed, they may even consider suing you for infringement of their rights.

### c) contract

One option to legitimise the copying is to get the permission set out in a contract. This could be a contract directly with the rights holder, in which the copyright owner sets out how much can be copied, for what purpose, and to what audience (for example, can the content be sent to clients, or is it only for use in-house). There are many other forms of contractual agreement in which the necessary rights can be obtained without the need to deal directly with the rights holder.

#### *Consortia licences*

Libraries often find it useful to work collaboratively in a consortium. Working together means that they are able to negotiate good deals with the suppliers because of their collective buying power. Licence negotiations can be quite time consuming, and another key reason for libraries to form consortia is because this doesn't require each institution or organisation to negotiate separately with the publisher. The negotiation team working for the consortium are able to build up considerable expertise in this area.

One example of a consortium is NESLi2 (<http://www.nesli2.ac.uk>), the UK's national initiative for the licensing of electronic journals on behalf of the higher and further education and research communities. NESLi2 is a product of the JISC and underwritten by the Higher Education Funding Council for England on behalf of the Funding Bodies. Key features of NESLi2 are:

- Use of the Model NESLi2 Licence for Journals
- A clearly defined list of publishers to seek agreements with, based on feedback from the community
- An independent and experienced Negotiation Agent
- Pre-defined criteria to assist the negotiation process
- Flexible order channels and access routes

#### *Shrink wrap*

Neither a shrink-wrap nor a click-use licence are negotiable. If you receive an item such as a book or cd-rom encased in plastic and there is a set of licence terms clearly visible, you would be bound by the terms of the agreement if you went ahead and opened the item

#### *Click use licence*

These are licences which are set out in a format in which you are required to click a button where you are agreeing to a set of terms and conditions. This happens when you install many software packages, and it is also used on a number of websites which won't allow you beyond the licence page until you have agreed to the website's terms and conditions. Some licence agreements are set out in a way that requires the user to scroll down the terms of the agreement in order to be able to click "Yes" or "I agree", even where you are happy to sign up to the terms.

There is no opportunity to negotiate the licence terms, you can only accept the site or the product if you say that you are agreeing to the terms.

#### *Crown & parliamentary copyright waiver*

The white paper "The future management of crown copyright" (Cm 4300) which was issued 26 March 1999 announced a new policy on crown copyright which allowed for unrestricted copying and reproduction of certain categories of Crown copyright material. Where copyright is waived this means that although copyright is asserted, government wishes to encourage the widespread use of the material. Users are permitted to copy or publish the material in any medium without having to seek formal permission or to pay a fee. HMSO do, however, set out a number of obligations for users:

- reproductions may only be made from the official version
- material must be reproduced accurately and in a manner and context which is not misleading as to its intended meaning and application
- content must not be used in connection with advertising, endorsement or in any context which could be viewed as undignified association
- material must not be used in any circumstances which are knowingly or potentially libellous or slanderous of individuals, companies or organisations
- it must be properly acknowledged – there is an appropriate set of words for this purpose which is set out in the guidance note

The policy with regard to crown copyright in legislative materials (Acts and statutory instruments) can be found in guidance note 6; while the policy for parliamentary

copyright material appears in the "Dear Librarian" letter and HMSO guidance note 14 (which covers reproduction of bills and explanatory notes to bills).

#### *Web copyright notice*

Many websites will set out in a copyright notice what users of the site are permitted to do. These terms should be respected. If you create a deep link to a website, you have to be careful, because it may state clearly in the terms and conditions that deep linking is not allowed. Creating a deep-link in such circumstances would mean that not only were you ignoring the site's terms and conditions; but you were getting anyone who follows your deep-link to do so without even having the chance to see that they are contravening the terms of the site.

There is also a question mark over the enforceability of a set of terms and conditions which appears on a website if people have to make a point of clicking on those terms. It is far better from the site owner's point of view if they design the website in a way which forces the user to look at the terms and conditions and to click on an "I agree" button before being able to get any further into the site.

#### **d) licence**

Under the heading of "licence" I am thinking specifically of licences issued by a collective licensing society acting on behalf of authors, publishers and artists.

In order for library and information professionals to make a legal copy of material for their users which is subject to copyright protection, if

- the copying is not covered by one of the copyright exceptions or permitted acts
- copyright clearance has not been sought from the rights holder directly
- the copying is not covered by a contract

then, there are still a number of other options available to legitimise the copying. They include:

- taking out a license from someone who acts on behalf of the rights holder, such as a collective

licensing society

- paying a copyright fee by using the CLA sticker scheme
- paying for a copyright cleared copy through a document supply service which is licensed by a collective licensing society

For library and information professionals, the main collective licensing societies need to consider are:

Copyright Licensing Agency Ltd  
90 Tottenham Court Road  
London  
W1T 4LP  
Tel: 020 7631 5555  
Website: <http://www.cla.co.uk>

Newspaper Licensing Agency  
7-9 Church Road  
Wellington Gate  
Tunbridge Wells  
TN1 1NL  
Tel: 01892 525273  
Website: <http://www.nla.co.uk>

Design and Artists Copyright Society  
Parchment House  
13 Northburgh Street  
London  
EC1V 0JP  
Tel: 020 7336 8811  
Website: <http://www.dacs.co.uk>

There are licensing schemes available from other organizations such as the licence for educational establishments from the Educational Recording Agency which covers all terrestrial broadcasting with the exception of Open University programmes.

Educational Recording Agency  
New Premier House  
150 Southampton Row  
London  
WC1B 5AL  
Tel: 020 7837 3222

The Patent Office maintains the website [intellectual-property.gov.uk](http://intellectual-property.gov.uk) and this has further information on licences available for printed material [http://www.intellectual-property.gov.uk/std/faq/copyright/licence\\_printed.htm](http://www.intellectual-property.gov.uk/std/faq/copyright/licence_printed.htm), as well as other types of content.

### What constitutes copyright infringement?

Copyright infringement is the unauthorised reproduction of a work which is still in copyright. The CDPA 1988 says that “copyright is not infringed unless the whole or a substantial part of a work is copied” (s16(3)(a)).

Over the past few decades a common means by which copyright infringements have occurred is through the use of the photocopier. Increasingly, though, infringements occur with content in digital form, which is then duplicated and distributed without either the authorisation of, or compensation to, the rights holder.

One question which people ask is whether they would still be breaching copyright if they were to copy out a text by hand, or by typing it into a word processor. The answer is yes, that to copy the content as a sequence of words would be an infringement. What it would avoid, though, is copyright infringement in the typographical arrangement of the work.

There can be either a primary or a secondary infringement of copyright.

#### *Primary Infringement*

If any of the copyright owner’s economic rights are used without permission, then this would be a primary infringement. The economic rights of an author are set out in section 16 of the CDPA 1988

16.—(1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom—

- (a) to copy the work;
- (b) to issue copies of the work to the public (section 18);
- (ba) to rent or lend the work to the public (section 18A);
- (c) to perform, show or play the work in public (section 19);
- (d) to communicate the work to the public (section 20);
- (e) to make an adaptation of the work or do any of the above in relation to an adaptation (section 21)

#### *Secondary infringement*

There are also some acts which could be said to be “secondary infringements” which are set out in sections 22-26 of the CDPA:

- Importing an infringing copy (s22)
- Possessing or dealing with an infringing copy (s23)
- Providing the means for making infringing copies (s24)
- Permitting the use of premises for infringing performance (s25)
- Providing of apparatus for infringing performance (s26)

Section 27 sets out the meaning of “infringing copy”

S27 (2) An article is an infringing copy if its making constituted an infringement of the copyright in the work in question.

(3) An article is also an infringing copy if

- (a) it has been or is proposed to be imported into the United Kingdom, and
- (b) its making in the United Kingdom would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work.

(4) Where in any proceedings the question arises whether an article is an infringing copy and it is shown—

- (a) that the article is a copy of the work, and
- (b) that copyright subsists in the work or has subsisted at any time,

it shall be presumed until the contrary is proved that the article was made at a time when copyright subsisted in the work.

### What are the consequences of copyright infringement?

A complicated intellectual property dispute in the High Court would be likely to cost over £100,000. As a result, if the infringement is of no great financial consequence, people will tend to look to alternative ways of resolving disputes, and many cases are settled informally out of

court. Where this happens it does mean that no legal precedent is set; and it may well be that the terms of the settlement are not disclosed.

Informal settlements will often be made on the basis that the rights holder grants a licence for what is being done in exchange for either a copyright fee or a royalty arrangement. For example, the Newspaper Licensing Agency do say on their website that there have been a number of instances in which, although it did not come to the issue of proceedings, nevertheless payments have been made to the NLA for unlicensed copying by a range of organisations, and the Agency names those organisations. The NLA have certainly brought a number of civil actions for infringement of both typographical arrangement copyright and literary copyright.

There are a number of remedies for copyright infringement. These are set out in chapter VI of the CDPA 1988. They include:

- **Injunction (s96)** – an aggrieved copyright owner may obtain a court order or injunction to prevent publication of a work which involves an infringement of copyright. The court would not normally allow an injunction if damages would provide a claimant with an adequate remedy.
- **Damages (s97)** – these would be awarded as far as the justice of the case may require. A court would look at all of the circumstances, but particularly to the flagrancy of the infringement and also to any benefits accruing to the defendant by reason of the infringement
- **Damages or account of profits (s98)** – a claimant has the option to be compensated for breach of copyright either by damages or by an "account of profits". The account represents the profit that the defendant has made from their use of the copyright work
- **Surrender of infringing copies (ss99-100)** – where a person has an infringing copy of a work in his possession, the owner of the copyright in the work can apply to the court for an order that the infringing copy or article be delivered up to him. Where an infringing copy of a work is found available for sale or hire, and for which the copyright owner would have been entitled to

have applied under a section 99 order, then the copyright owner has the right to seize the infringing copies. However, before anything can be seized the rights holder must give notice of the time and place of the proposed seizure to a local police station.

It isn't only the remedies that are set out in the legislation which need to be taken into account. There is also the PR risk of being caught out for copyright infringement, because this can lead to bad publicity, and harm the reputation of the organisation. In the case of quoted companies, bad publicity always has the potential to affect the company's share price.

Copyright cases would normally be treated as civil actions which are pursued through the courts. However, civil remedies are not the only way of enforcing copyright. The deliberate infringement of copyright on a commercial scale – which is commonly referred to as "copyright piracy" - may be a criminal offence which could lead to a prison sentence.

### **The new offences under the Copyright & Related Rights Regulations 2003**

#### *Circumvention of technological protection measures*

Anyone deliberately circumventing or avoiding a technological protection measure or devising equipment to avoid them may be guilty of a criminal offence as well as a civil one. A technological measure is defined in s296ZF as "any technology, device or component which is designed, in the normal course of its operation, to protect a copyright work other than a computer program". In order to qualify for legal protection a technological measure must be effective. A device is considered to be effective if use of the work is controlled by the copyright owner through either: an access control or protection process such as encryption, scrambling or other transformation of the work or a copy control mechanism. It is now clearly an offence to try to interfere with such protection mechanisms or get round them to avoid the restrictions that copyright owners have attached to them.

*Communicating the work to the public where this affects prejudicially the owner of the copyright*

Section 107 (2A) of the CDPA says:

A person who infringes copyright in a work by communicating the work to the public -  
(a) in the course of a business, or  
(b) otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright,

commits an offence if he knows or has reason to believe that, by doing so, he is infringing copyright in that work.

*Infringing a performer's making available right where this affects prejudicially the owner of the copyright*

Section 198 (1A) says:

A person who infringes a performer's making available right -  
(a) in the course of a business, or  
(b) otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the making available right,

commits an offence if he knows or has reason to believe that, by doing so, he is infringing the making available right in the recording";

*Removal or alteration of electronic rights management information prohibited*

Any attempt to interfere with electronic rights management information, remove it or retransmit a work without it is a criminal offence. "Electronic rights management information" refers to any information which is provided by the rights holder and identifies the work, the author or any other right holder, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information.

The new offences involve a test of mens rea (or knowledge), hence the use of words such as "commits an offence if he knows or has reason to believe that..."; as it is not intended to criminalise people who

inadvertently do something illegal.

See the Frequently Asked Question – "Are civil remedies the only way of enforcing copyright?" at [http://www.intellectual-property.gov.uk/std/faq/copyright/civil\\_remedies.htm](http://www.intellectual-property.gov.uk/std/faq/copyright/civil_remedies.htm)

## Legal cases

### 1984 - Publishers Association v Manchester City Council

In 1984 the Publishers Association took a representative action on behalf of two publishers and two authors and all its other members following the discovery of hundreds of photocopies of a standard mathematics textbook. The author of the book was a supply teacher. One day he was sent to a school in Manchester where on opening a cupboard to get the textbooks for the lesson he was surprised when quantities of photocopies of his own book fell about his feet.

*Outcome:* Manchester City Council was ordered to pay £75,000 for the copyright infringement. The costs and publicity resulting from that case persuaded local authorities to sign up for a schools licence with the CLA.

### 1991 - CLA v Morgan Stanley

An overenthusiastic individual at US securities house Morgan Stanley copied a £75 book on "Warrants, options and convertibles" published by IFR Publishing and then distributed one of the photocopies to a client and kept 22 copies for internal use. This infringement deeply embarrassed Morgan Stanley when it found out what had happened.

*Outcome:* Morgan Stanley were forced to pay an out of court settlement of £4,030 damages. Buying the books would have cost £1,725.

### 1994 - CLA v Essenheath t/a Greenwich college

Essenheath Ltd is the trading arm of Greenwich College, an independent business college in London. The CLA acting on behalf of publishers (the Open University and Centaur Press) hired a private investigator to enrol as a student and found evidence that the college had reproduced copyright material without permission or licence for use in course work by students.

*Outcome:* The CLA obtained a considerable financial settlement for the unauthorized photocopying, and the college was ordered to take out a CLA licence

### 1994 - American Geophysical Union v Texaco Inc

In October 1994, over 80 publishers of scientific and technical journals brought a case against Texaco claiming that copying by its scientists and engineers of articles from the journals for future reference constituted copyright infringement. In order to simplify the litigation, the case was limited to the specific issue of whether the copying was "fair use" under US copyright legislation on facts which were limited to the copying of eight specific articles by one chemical engineer. Each of the journals in question included general statements that no parts of the journal could be copied without the permission of the copyright owner. It appears that it was general practice for the library at Texaco to circulate the journals and for researchers to make personal copies of any articles which they considered useful to keep for future reference.

Even though there are differences between US and UK copyright law, this was a landmark case which was seen as adding strength to the CLA's efforts to get companies to take out a copyright licence with them.

*Outcome:* a U.S. appellate court ruled that the photocopying from scientific journals by researchers at Texaco was not "fair use". The court took account of the existence of a collective licensing scheme by the Copyright Clearance Center as well as the existence of document delivery services, and it concluded that corporations must either curb their photocopying or buy into licensing agreements with journals.

Texaco had proposed an out-of-court settlement under which it would pay more than \$1 million to the 83 plaintiffs and purchase licenses covering photocopying by its researchers.

### 1994 - CLA v Fournier Pharmaceuticals

Fournier Pharmaceuticals Ltd is the British affiliate of the leading French pharmaceutical company, Groupe Fournier, which is one of the largest private companies in France. The company accepted that copyright had been infringed in an internal current awareness bulletin circulated to its sales and marketing staff.

Publications that were cited included articles from the British Medical Journal and the Lancet.

*Outcome:* Fournier Pharmaceuticals Ltd reached an out of court settlement for copyright infringements, and agreed to take out a Business Photocopying Licence with the CLA.

#### **1996 - CLA v Store Street Press**

Undercover detectives acting on CLA's behalf investigated the Store Street Press copyshop after receiving reports of an operation to cheat authors and publishers. CLA's investigators found huge quantities of photocopying being undertaken by the shop without either a CLA licence or the authorisation of the publishers. The offending copying mainly comprised course packs (including large excerpts from works published by Cambridge University Press, Elsevier, Macmillan, Penguin and Routledge) for students at the School of Oriental and African Studies.

*Outcome:* The Copyright Licensing Agency exposed and stopped this photocopying scam, and the shop was liable for substantial costs and damages.

#### **1996 - CLA v Dar Al Handasah**

CLA took Dar Al Handasah Consultants (UK) Limited - one of the largest structural engineering consultancies in the UK - to the High Court for extensive copyright infringement over a long period of time. CLA were responding to a whistleblower who rang their Copywatch Hotline and informed them of large scale illegal copying. CLA then took steps to confirm the accuracy of the accusations by employing a firm of private investigators to obtain supporting evidence.

*Outcome:* Dar al Handasah settled with the Copyright Licensing Agency and four of its mandating publishers for a sum of £50,000 in damages and costs. Dar Al Handasah also agreed to take out a CLA licence.

#### **1998 - NLA v Islington Borough Council**

The Newspaper Licensing Agency granted a licence to Islington Borough Council but the council refused to pay the NLA's invoice. When it proved impossible to resolve the matter out of court, the NLA brought a civil action for copyright infringement.

*Outcome:* The Council accepted an undertaking that it would not copy cuttings from newspapers in the NLA's repertoire unless licensed to do so.

#### **2001 - Newspaper Licensing Agency v Marks and Spencer plc [2001] UKHL 38 (12th July 2001)**

M&S subscribed to a press cuttings service from the Broadcast Monitoring Company. The agency pays NLA a fee for a licence to copy the cuttings. But M&S makes further copies and has no licence to make these further copies. The House of Lords ruled on whether the making of these copies infringed copyright in the typographical arrangement of the published editions of the newspaper. Often the agency rearranges the text to fit onto A4 sheets on which the cuttings are supplied.

The case went right up to the House of Lords, which ruled, on 12 July 2001, that Marks and Spencer had not infringed typographical copyright by photocopying newspaper clippings for distribution to its executives.

On the true construction of s8(1) of the Copyright, Designs and Patents Act 1988, the words "typographical arrangement of published editions" in s1(1)(c) of the Act referred not to the typographical arrangement of each individual article published in a newspaper, but to the typographical arrangement of the whole newspaper. HL said that the question was therefore whether the copying amounted to a "substantial part" of the whole newspaper.

However, the decision does not affect the NLA's entitlement to enforce literary copyright mandated to it. The Court of Appeal's decision in the case against M&S also makes it clear that copying of articles will not be excused by being considered to be fair dealing for the purpose of reporting news and current events, although when the case reached the House of Lords the question of fair dealing wasn't addressed.

*Outcome:* The litigation with M&S was settled on the basis that M&S have now taken a standard NLA licence to copy newspaper cuttings for its internal management and information purposes.

The House of Lords decision was based solely on the issue of typographical

copyright. There still remains a requirement for companies to obtain a licence for the copying and circulation of newspaper articles which are protected by literary and artistic copyright.

### **2001 - Ordnance Survey Northern Ireland v Automobile Association**

Ordnance Survey (OS) launched a High Court action against the Automobile Association in 1996 after they were caught copying dozens of OS maps. Cartographers at Ordnance Survey trapped the copiers by putting faults, such as tiny kinks in rivers, in dozens of maps. These helped to prove that 26 million published guides, which the AA claimed as its own work, were straightforward copies.

In 2000 the AA had already admitted breaching crown copyright of 64 maps and agreed to pay £875,000 compensation. In this separate case more than 500 publications were involved with more than 300 million copies printed.

*Outcome:* The Automobile Association agreed to pay £20m in compensation. The money was paid over a period of two years and covered back-dated royalties, interest, legal costs and an advance on the AA's coming royalties for the next year.

### **2001 - Universities UK (formerly CVCP) v Copyright Licensing Agency**

Long held UUK grudges came to a head in July 2000 during negotiations for a new licence. The CLA wanted to raise the per student fee and also tried to introduce a separate charge for the licensing of any artwork within the material. UUK referred the case to the Copyright Tribunal whose decisions are binding.

The tribunal decided that over 22 per cent of current copying is fair dealing, and took this into account in calculating the new fee. The case established that the CLA's Rapid Clearance Service (CLARCS) was both costly and complex to administer. Of the total £971k that CLARCS collected in 2000/01, CLA's own administrative costs on higher education copying fees alone were £355k – quite apart from the cost to universities.

*Outcome:* The Copyright Tribunal Decision includes a number of key rulings with regard to the CLA licence for higher education institutions:

- The photocopying fee paid to the CLA

by universities per full-time equivalent student increased from £3.25 to £4.00

- The new licence operates for 5 years backdated to 1 August 2001 with an annual RPI uplift.
- Course pack clearances were now to be rolled into the main blanket licence
- All artistic works are included in the licence
- The ruling made no changes to the proportion of a work that could be copied under the terms of the blanket licence (up to 5% of the total, or one chapter; one poem or one article of a work)
- Fees collected from the HE sector from July 2000 to July 2001 were not affected
- All distance learning students, including those overseas are included in the blanket licence
- CLA no longer have the power to add to the excluded categories, but can still add to the list of excluded works
- CLA were ordered to pay 25% of UUKs costs with an immediate payment of £100k

### **2001 - British Horseracing Board v William Hill**

This was the first real test of database right, although the topic had been touched upon in earlier court cases. British Horseracing Board won a high court challenge against William Hill over the use of pre-race data. BHB argued that internet bookmakers who wished to use information such as runners and riders should pay a copyright fee. The court decided that the defendants had infringed the database right in listings of horses scheduled to run in forthcoming races. It was accepted that there was nothing intellectual or creative in making such lists, but since considerable investment had gone into the creation of the lists, database right was justified.

The BHB database was being constantly updated. Indeed, the cost of continuing to obtain, verify and present the contents of the database were approximately £4m per year, involving about 80 staff and extensive computer software and hardware. The database contained details of over a million horses. It consists of some 214 tables, containing over 20 million records. An estimated total of 800,000 new records or changes to existing records were made each year.

In May 2002 the Court of Appeal referred a number of questions concerning the interpretation of the database directive to the European Court of Justice, and Advocate General Stix-Hackl's Opinion on these issues was published on 8<sup>th</sup> June 2004.

*Outcome:* The Court of Appeal judge – who was subsequently backed by the Advocate General - held that

- William Hill was infringing BHB's database right by using that data in its internet business without a valid licence
- the taking of information from that source by William Hill and the loading of it onto its own computers for use on its web site was an act of extraction of a substantial part of the BHB database
- the subsequent re-transmission of that data on William Hill's web site for access by the public was re-utilisation
- there was also repeated use of insubstantial parts of the database, which conflicted with BHB's normal exploitation of the database, and unreasonably prejudiced BHB's legitimate interests

#### **2001 - Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142**

In October 1997 Paddy Ashdown, former leader of the Liberal Democrats, had made a minute of a meeting he attended with the Prime Minister and a copy of this was subsequently disclosed to The Sunday Telegraph. In November 1999 the newspaper published a number of articles incorporating substantial sections of the minute. The articles alleged that Prime Minister Tony Blair had discussed with the then Liberal leader plans for a coalition Cabinet.

In one of its defences of breach of copyright, the Telegraph had relied on the Human Rights Act provisions governing freedom of expression. However, Vice Chancellor Sir Andrew Morritt ruled in the High Court that the rights to freedom of expression did not override copyright and gave Mr Ashdown summary judgment to claim damages for breach of copyright.

Sir Andrew Morritt gave permission for the Telegraph Group to appeal. Whilst the Court of Appeal did decide that there were

certain circumstances in which the Human Rights Act could override existing copyright law, nevertheless, their ruling also went in favour of Mr Ashdown. The Court of Appeal judgment clarifies that the courts will allow unauthorised use of copyright works either under the fair dealing defence or s171(3) public interest exemption, provided that the copying is limited to what is required to serve the public interest rather than the commercial interests of the publisher.

*Outcome:* Telegraph Group Limited were ordered to pay 95 per cent of Paddy Ashdown's costs; and to pay £20,000 on account of costs into court within 14 days. Leave to appeal to the House of Lords was refused.

#### **2001 - Tasini v New York Times**

*Tasini et al vs The New York Times et al* is a landmark lawsuit which was brought by members of the National Writers Union against The New York Times Company, Newsday Inc., Time Inc., Lexis/Nexis, and University Microfilms Inc., charging copyright violation regarding the electronic reuse of work produced and sold on a freelance basis.

For many years freelance writers sold stories to American publications on the understanding that they were selling only First North American Serial rights. These rights allowed the newspaper or magazine to publish the story in print one time only. However, with the advent of electronic media - including online databases - publishers had been selling freelance-authored material to electronic databases such as Lexis-Nexis, even though the authors had not assigned copyright in their electronic rights and without any additional payment being made to the original authors.

*Outcome:* The judges ruled that, even when there is no contract relating to electronic rights, a print publisher may not put the writings of freelancers on databases and CD-ROMs that include the entire textual content of the print publication. In effect, unless there is a written contract to the contrary, freelancers automatically retain electronic rights to their printed work.

The freelance writers had wanted payment for their work being available on the online hosts. However, what happened instead was that the hosts removed many articles from their services

From the publishers point of view, it is imperative that they get their freelance writers to sign copyright assignment forms; and – just as importantly – that they take good care of those assignments, and are able to produce them if they are ever challenged by a freelancer who claims that they have never handed over their electronic rights.

From the point of view of people who have signed an agreement with an online service, they need to ensure that their agreements contain a warranty which confirms that the licensor has the legal right to licence use of the copyright material; and that it does not infringe the intellectual property rights of any third party; and the warranty should also be backed up by an indemnity to this effect.

### **2002 - Copyright Licensing Agency v Photocopier Maintenance and Servicing**

Photocopier Maintenance and Servicing, a private copyshop in Nottingham were copying entire books in the fields of medicine, law, business management, marketing and computers which were then being offered for sale to local students for a fraction of the price it would have cost them to purchase copies of the publications.

*Outcome:* Following a covert investigation, the CLA acting on behalf of its authors and publishers obtained a High Court injunction. The CLA and its lawyers, Denton Wilde Sapte entered the premises and enforced the order. Over 500 copies of some 100 titles were seized. The proprietor agreed to a consent order giving undertakings to the court regarding future illegal copying: any breach of the court undertakings could result in a fine, imprisonment or seizure of assets. The proprietor also agreed to take out a CLA licence and to pay an undisclosed sum in costs and damages.

### **2003 - Lowry's Reports v Legg Mason**

Legg Mason shared one paid \$700 subscription to Lowry's Market Trend Analysis with more than 1,300 employees over the company's intranet.

In mid-2003 the federal district court in Maryland found Legg Mason liable to Lowry's for breach of contract and wilful copyright infringement.

*Outcome:* Legg Mason were required to pay newsletter publisher Lowry's Reports \$19,725,270 in damages and lost subscription fees. Legg Mason went back to court in February 2004 seeking a reduction in the award for damages; but instead the figure was upheld.

### **Minimising risk and risk management**

In order to minimise the risk of being charged with copyright infringement, you should start by asking key questions:-

#### What copying do you undertake, and from what content?

- Do you subscribe to journals, newsletters and magazines?
- Do you get newspapers each day?
- Do you have a collection of books and reference directories?
- Do you receive e-journals or newsletters by email?
- Do you have photocopiers or scanners?
- Do you or your organisation make photocopies of material that is protected by copyright?
- Do you get contacts in other organisations to send you photocopies from books, magazines or newspapers
- Do you make digital copies of material that is protected by copyright eg
  - Do you download whole reports and publications off the internet
  - Do you forward electronic copies of journals, articles, books or reports to multiple recipients
  - Do you download music files using peer-to-peer networks such as Kazaa or Grokster
  - Do you download software via email or the internet
- Is the same item copied many times for substantially the same purpose at substantially the same time by people working or studying together

#### By what means is the copying authorized?

Once you have a clear idea about what copying is undertaken, you then need to consider whether that copying is legitimate:

- Is it authorized by one of the statutory exceptions such as fair dealing, or library privilege

- Is it covered by a contract
- Do you have the rights holder's permission to copy the content; or
- Is the copying covered by a licence from one of the collective licensing societies

Do the contracts & licences you have cover all your copying activity?

Even if you have a contract or licence in place to enable you to copy content, you still need to be clear about whether you are complying with the terms of the licence.

Does the licence or contract cover what you are doing in terms of

- how many people you are sending the material to
- the status of those people (are they employees, or are they outside the organisation)
- the location of the people the material is being sent to (do users located in overseas offices, or indeed in satellite offices based in the UK - fall into the definition of "authorised user").
- the purpose for which the copying is being done (for example, if there is an article in a newspaper or magazine that is quite complimentary about your company, are you allowed under the contract or licence to copy the material for use by the sales force as a sales aid).

Copyright compliance is really a question of managing risk, and therefore it is worth setting out what would be considered to be low, medium or high risk activities.

#### Low Risk

- Copying for users under the library regulations

Copying under library privilege is carefully prescribed in The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations: SI 1989/1212

If your copying complies with the conditions set out in the regulations, then it can be considered to be "low risk"

In addition to setting limits on what can be copied - (one article or a reasonable proportion) - it requires the

user to sign a declaration saying:

- I have not previously been supplied with a copy of the same material by you or any other librarian;
- I will not use the copy except for research for a non commercial purpose or private study and will not supply a copy of it to any other person; and
- to the best of my knowledge no other person with whom I work or study has made or intends to make, at or about the same time as this request, a request for substantially the same material for substantially the same purpose

- Single copying

Making a single copy within the agreed safe copying limits is at the lower end of the scale of risks

- One article or a reasonable amount

The agreed safe copying limits are one article from any one issue of a journal or periodical or in the case of published works one chapter or 5% of extracts.

Even these copying limits don't give you an absolute guarantee that your copying would be considered by a court to be legitimate; but sticking to the limits certainly means that the copying would be at the lower end of the risk scale

- Declaration form

When a librarian in a "prescribed" (not-for-profit) library relies on the Library Regulations in order to copy material on behalf of a library user, the user is required to sign a copyright declaration form. In exchange, the librarian gets a statutory indemnity

#### Medium Risk

- Fair dealing for research for a non-commercial purpose or private study, criticism or review, or news reporting

The fair dealing exceptions are not as specific as the Library Regulations. The legislation does not make it clear what

would be deemed to be "fair". Consequently, this has to be judged on the basis of each individual instance of copying, and no-one can be absolutely sure that the copying is fair, unless it is deemed to be so by a court. Fair dealing is therefore a rather risky and unpredictable defence.

It should be pointed out that fair dealing is not a right and as such it does not provide any guarantee of immunity against an action for copyright infringement. Rather, it is a defence that you might call upon if you were to be faced with an action for infringement. In such a case, you would have to prove that the copying passed the Berne 3-step test<sup>1</sup>.

In the United States they do not have "fair dealing", but "fair use", and people in the USA consider four key criteria – PNAM - in order to determine whether it was right to rely upon the fair use provisions:

P – purpose  
N – nature  
A – amount or substantiality  
M – market impact

In the *Lowry's Reports v Legg Mason* case, for example, the court applied these four factors in order to evaluate Legg Mason's fair use claim:

**PURPOSE:** The commercial nature of the defendant's business leans against a finding of fair use.

**NATURE:** The nature of the newsletter is that of a factual work which contains useful information gathered by the publisher. Each issue is often only four pages long, and an annual subscription to the title cost \$700.

**AMOUNT OR SUBSTANTIALITY:** The amount and substantiality factor goes against Legg Mason because the company were reproducing each issue in its entirety.

**MARKET IMPACT:** The effect on the market also weighs against Legg Mason because Lowry's is a small publisher which restricts subscriptions to individual subscribers. Thus, the court found there was no fair use.

### High Risk

- Copying whole works

It is absolutely clear from section 16(3)(a) of the CDPA 1988 that to copy a whole work would be an infringement

- Making multiple copies of the same item

Multiple copying cannot be justified if you are relying on either the exception of fair dealing for research for a non commercial purpose or library privilege

- Systematic single copying

There is a repeated and systematic act when it is carried out at regular intervals, for example, weekly or monthly.

- Any commercial exploitation

At the absolute top end of the scale of risks would be instances of copying which lead the person who copies to benefit at the expense of person who owns the content. You should not make money out of someone else's content, without their permission or consent, and then fail to pass any of that money to the rights holder.

A court would take into account the benefit - the amount of money - accruing to the defendant by reason of the infringement

I would also add to this list the copying of content by electronic means. Where rights holders' content is available in digital form, they are much more protective of it and a number of them will enforce their rights more aggressively. They want to prevent their digital content from being used, duplicated and distributed without authorisation or compensation.

Do you ever purchase e-books, electronic journals, reports, or articles in digital form on behalf of your users? If so, do you ensure that there is a covering note which makes clear the copyright status of the item? Here is an example of a notice you can send with electronic products that are forwarded by email:

Please be aware that we have paid the copyright fee for only one copy of this e-book/ report/ article. If you need another copy, let me know and we will order another copy and pay the appropriate fees. Please delete the electronic copy of the article after you print a paper copy

**Sample copyright notice to attach when forwarding digital content**

### Organisational policies relating to the copying of copyright material

Each organisation will have its own requirements for copying content, and will need to develop a policy which reflects those needs. In order to demonstrate that they are taking copyright seriously, there are a number of steps which can be taken.

#### Copyright posters

One obvious step would be to ensure that you place posters prominently next to photocopiers, scanners, and computer terminals.

CILIP produce two kinds of copyright posters. There is a gold poster which has been designed for display beside photocopying and optical scanning machines; and there is a blue poster which covers downloading from databases or from the internet, which is designed for display alongside computer workstations and printers

Licensees of the Copyright Licensing Agency can place next to photocopiers:

- the CLA's copyright notices. [http://www.cla.co.uk/directive/LibraryPoster\\_A4.pdf](http://www.cla.co.uk/directive/LibraryPoster_A4.pdf).
- the CLA's excluded works list and
- the "List of US participating publishers in the CLA / CCC agreement".

#### Copyright declaration forms

Where a librarian of a prescribed<sup>1</sup> (not-for-profit) library undertakes copying on behalf of library users, there is a legal requirement to ask the requester to complete a copyright declaration form before the copy is made.

The wording of the declaration forms must reflect the changes to copyright law which came into effect in October 2003 – namely that the user signs to say that the copying is for copying for a non-commercial purpose or private study.

There are two types of form, and there are model forms available to use from the LACA website:

FORM A must be used when providing privileged copies to users published works. [http://www.cilip.org.uk/committees/laca/LACA\\_Model\\_FORM\\_A\\_wef\\_31Oct03.rtf](http://www.cilip.org.uk/committees/laca/LACA_Model_FORM_A_wef_31Oct03.rtf)

FORM B must be used when providing privileged copies to users from unpublished works.

[http://www.cilip.org.uk/committees/laca/LACA\\_MODEL\\_FORM\\_B\\_wef\\_31Oct03.rtf](http://www.cilip.org.uk/committees/laca/LACA_MODEL_FORM_B_wef_31Oct03.rtf)

The declaration form provides the librarian with an indemnity. If the regulations have been followed correctly, the librarian is protected from accusations of infringement. It is therefore imperative that you keep the forms. Taking into account the Limitation Act, the forms should be kept for up to six years plus the current year.

Librarians must remember that they are not expected to police what individuals sign on the declaration forms. They should be careful not to decide for people that the copying is for a non-commercial purpose, even if they are asked to give users advice in interpreting the form. The decision rests with the user. The best thing to do would be to point library users to the document "Changes to UK copyright law: a joint note from the British Library and The Copyright Licensing Agency", or to the CILIP copyright posters.

There are no declaration forms for the other copyright exceptions, only for "library privilege". The Patent Office are not sure that it would be appreciated if there were a

<sup>1</sup> The list of prescribed libraries is set out in Schedule 1 of the Library Regulations (SI 1989/1212). It includes public libraries; national libraries; libraries in educational establishments; parliamentary and government libraries; local authority libraries; and libraries whose main purpose is to encourage the study of a wide range of subjects (including libraries outside the UK)

host of forms. You can always devise your own form to cover other exceptions if you so wish, but these would carry no statutory indemnity.

### Organisational documentation

Your organisation may have a copyright policy which is set out in places such as:

- Staff handbook
- Statement on responsible use of the intranet
- A guide to copyright written by the in-house lawyer
- A set of frequently asked questions which deals with the typical uses your organisation makes of copyright protected material

If not, you should think about developing such a policy, and making it available in company documentation. Elizabeth Gadd's web site: "Clearing the Way" <http://www.lboro.ac.uk/library/crightpages.html> has links to lots of examples of copyright policy statements and publicity material generated by universities.

The contents of a company statement on copyright could, for example, include statements such as:

- Don't copy a third party's property unless you have authority to do so. Making a hard or electronic copy (or simply storing the work) without the permission of the owner is an infringement of copyright
- Be careful about copying material available on the internet. Copying third party property may expose the company and yourself to actions for infringement, including a claim for damages.
- Don't reproduce copyrighted material without authorisation from the copyright owner
- You may make one copy of an extract (within the agreed safe limits) of a literary, dramatic, musical or artistic work for your own interest or private study, but you cannot reproduce it for others. You must acknowledge the source.

- You may reproduce limited excerpts from a work for the purpose of criticism, review or news reporting. You must acknowledge the source.

One question which people have asked me a number of times relates to liability for copyright infringement: If an employee carries out an act of copyright infringement, would it be the employee or the employer who would be liable?

It is true that employers are vicariously liable for the acts of their employees and consequently that they are liable for copyright infringements which are committed by their employees carried out in the course of employment. The employer could potentially have an injunction served upon them to prevent infringement of copyright taking place on their premises, they could be required to pay damages, and they could also be held criminally liable.

However, bear in mind that:

- a) an employee is under a contractual duty of fidelity and that means, among other things, not committing illegal acts in the course of employment
- b) if the Staff Handbook says something along the lines "Don't reproduce copyrighted material without authorisation from the copyright owner" and "The use of any pirated material or copies or copying in any form would be in breach of company policy", then you need to bear in mind that an act of copyright infringement could be a breach of the company rules. The handbook may well spell out the consequences: "Please note that any staff member found to be in breach of the terms of this code of conduct may be subject to disciplinary action and, depending on the severity of offence, may be dismissed".

### Staff training & awareness

In order to raise awareness of the issues involved in copyright compliance, you may find it useful to organise some staff training. If you hold the training in-house, this gives

you the opportunity to tailor the training in order to take account of your organisational policy; and to cover the sorts of questions that regularly come up. These could then be developed into a set of frequently asked questions. The course can also remind people of the key contact within the organisation who deals with copyright queries.

External training is available either through copyright consultants or through training companies. If you do employ an external consultant, you will need to ask yourself whether they are experts in your type of organisation – what sector it falls into - and the types of material you copy such as photographs or maps, as some areas are extremely specialised. You will also need to negotiate with the consultant on what areas are to be covered. Don't, for example, ask for a basic overview of copyright issues if you are going to want the trainer to cover very specialist areas.

### Keeping within the terms of licence agreements

Even if you have a licence with a collective licensing society, you are still going to need to be mindful of the limitations of the licence agreement.

In the case of the Copyright Licensing Agency, for example, you need to make sure:

- the item you want to copy is not on the excluded works list (or in the case of US publications, that it is from one of the participating publishers)
- that it is published in one of the licensed territories (UK, Australia, Canada [inc Quebec], Denmark, Finland, France, Germany, Greece, Iceland, Ireland, The Netherlands, New Zealand, Norway, South Africa, Spain, Sweden, Switzerland [including Liechtenstein] and participating US publishers) are currently covered.<sup>2</sup>
- that you stay within the approved limits – these will differ from one CLA licence to another (for example, the limits in the business licence are:
  - no more than 5% of any item of Licensed Material, or:
  - (a) in the case of a periodical

- publication, one whole article; or
- (b) in the case of a published report of judicial proceedings, the entire report of a single case; or
- (c) in the case of a book, one chapter).

Check the terms of the licensing scheme in order to make sure that you are familiar with them and that you fully understand them.

Section 136 of the CDPA 1988 (Implied indemnity in schemes or licences or reprographic copying) sets out that licensees who take out an agreement with a collective licensing society are indemnified from action being taken against them, so long as the terms of the licence are complied with.

136.—(1) This section applies to—

(a) schemes for licensing reprographic copying of published literary, dramatic, musical or artistic works, or the typographical arrangement of published editions, and

(b) licences granted by licensing bodies for such copying,

where the scheme or licence does not specify the works to which it applies with such particularity as to enable licensees to determine whether a work falls within the scheme or licence by inspection of the scheme or licence and the work.

(2) There is implied—

(a) in every scheme to which this section applies an undertaking by the operator of the scheme to indemnify a person granted a licence under the scheme, and

(b) in every licence to which this section applies an undertaking by the licensing body to indemnify the licensee,

against any liability incurred by him by reason of his having infringed copyright by making or authorising the

<sup>2</sup> For an up to date listing of the countries covered by the CLA licence, see [http://www.cla.co.uk/have\\_license/support/excluded.html](http://www.cla.co.uk/have_license/support/excluded.html)

making of reprographic copies of a work in circumstances within the apparent scope of his licence.

(3) The circumstances of a case are within the apparent scope of a licence if—

(a) it is not apparent from inspection of the licence and the work that it does not fall within the description of works to which the licence applies; and

(b) the licence does not expressly provide that it does not extend to copyright of the description infringed.

(4) In this section "liability" includes liability to pay costs; and this section applies in relation to costs reasonably incurred by a licensee in connection with actual or contemplated proceedings against him for infringement of copyright as it applies to sums which he is liable to pay in respect of such infringement.

(5) A scheme or licence to which this section applies may contain reasonable provision—

(a) with respect to the manner in which, and time within which, claims under the undertaking implied by this section are to be made;

(b) enabling the operator of the scheme or, as the case may be, the licensing body to take over the conduct of any proceedings affecting the amount of his liability to indemnify.

### Checklist of key things for keeping legal with copyright

**Tip 1:** Don't look at the Copyright Designs and Patents Act 1988 as originally published, because there have been so many changes to the wording since then. Instead, you must look for an annotated copy of the Act. These can be found in up-to-date legal textbooks (such as Butterworths Intellectual Property Law Handbook).

**Tip 2:** Only look for commentaries and books on copyright which have been published since October 2003 when the new law took effect.

**Tip 3:** Think about whether you should have a notice on your library OPAC about document supply services - Here is a sample form of words relating specifically to the ordering of items through inter-library loan:

#### Inter-library loan requests

Are you requesting ILL photocopies for commercial purposes? Not sure? See the example scenarios set out in our copyright information notice. If yes, you need to use the copyright fee paid service. Ask a member of library staff before proceeding

**Tip 4:** Put copyright posters next to photocopiers, scanners, and computer terminals, and ensure that the posters take account of the new law. CILIP have two types of posters (<http://www.cilip.org.uk/committees/laca/poster.htm>): a gold poster intended for display beside photocopying and optical scanning machines; and a blue poster which covers downloading from portable databases and copying from the internet; and then there is also a poster from the CLA ([http://www.cla.co.uk/directive/LibraryPoster\\_A4.pdf](http://www.cla.co.uk/directive/LibraryPoster_A4.pdf))

**Tip 5:** Do you undertake any copying which is not covered by the permitted acts/copyright exceptions? If so, you should consider taking out a licence to copy the material (eg. with the Copyright Licensing Agency <http://www.cla.co.uk>, or the Newspaper Licensing Agency <http://www.nla.co.uk> or direct with the publisher).

**Tip 6:** Make sure that if you are using copyright declaration forms, that they have the correct form of words on them, to reflect the narrowing of the fair dealing and library privilege exceptions. A model form of words for these can be found on the LACA website ([http://www.cilip.org.uk/committees/laca/LACA\\_Model\\_FORM\\_A\\_wef\\_31Oct03.rtf](http://www.cilip.org.uk/committees/laca/LACA_Model_FORM_A_wef_31Oct03.rtf) [http://www.cilip.org.uk/committees/laca/LACA\\_MODEL\\_FORM\\_B\\_wef\\_31Oct03.rtf](http://www.cilip.org.uk/committees/laca/LACA_MODEL_FORM_B_wef_31Oct03.rtf))

**Tip 7:** If you do not have any copyright licences for your organization, and you wish to make copies which would be considered to be for a "commercial purpose", make sure that they are "legal" by either purchasing copyright cleared copies through a licenced document delivery service such as the British Library, or under the CLA sticker scheme

### Where to go to seek advice

- CILIP's information & advisory service [info@cilip.org.uk](mailto:info@cilip.org.uk) -- only for members of CILIP – the Chartered Institute of Library and Information Professionals
- Libraries and Archives Copyright Alliance <http://www.cilip.org.uk/laca> -- LACA lobbies the government and the EU on all aspects of copyright on behalf of UK libraries, archives and information services and their users. People can contact committee members via the LACA website
- IPR Helpdesk <http://www.ipr-helpdesk.org>
- Intellectual Property <http://www.intellectual-property.gov.uk> -- maintained by the Patent Office
- JISC <http://www.jisclegal.ac.uk> -- Legal  
Serves the higher and further education communities

### Further reading

Cornish, Graham P. (2004). Copyright: interpreting the law for libraries, archives and information services. 4th ed. Facet Publishing. ISBN 1856045080.

Cornish, Graham P. (2003). Guidelines on the recent changes to copyright law. The Libraries and Archives Copyright Alliance and the Museums Copyright Group. [http://www.cilip.org.uk/committees/laca/mcglaca\\_legislationguidelines.pdf](http://www.cilip.org.uk/committees/laca/mcglaca_legislationguidelines.pdf)

Norman, Sandy (2004). Practical copyright for information professionals: the CILIP handbook. Facet Publishing. ISBN 1856044904

Padfield, Tim (2004). Copyright for archivists and users of archives. 2nd ed. Facet Publishing. ISBN 1856045129

### Legislation

Copyright Designs and Patents Act 1988  
Copyright etc. and Trade Marks (Offences and Enforcement) Act 2002  
Copyright (Visually Impaired Persons) Act 2002

Copyright and Related Rights Regulations 2003: SI 2003/2498  
Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989: SI 1989/1212  
Copyright and Rights in Databases Regulations 1997: SI 1997/3032

Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

Directive 2004/48/EC of 29th April 2004 on the enforcement of intellectual property rights IN OJL 195/16 of 2nd June 2004.