

A comparative study of library provisions from photocopying to digital communication

Research Paper
prepared for the Centre for Copyright Studies Ltd
by
the Australian Copyright Council

ISBN 1 876692 02 2

Published by the Centre for Copyright Studies Ltd

ACN 058 847 948

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Centre for Copyright Studies Ltd

The Centre for Copyright Studies Limited was established in 1993. Its primary purpose is to undertake and promote research into copyright. The Centre is funded by Copyright Agency Limited, a copyright collecting society representing authors and publishers.

This publication is part of the Centre's programme of commissioned research. Previous publications include *Copyright in the New Communications Environment: Balancing Protection and Access*, September 1999 and *The Benefits and Costs of Copyright : An Economic Perspective*, July 2000.

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Australian Copyright Council

The Australian Copyright Council is a non-profit organisation established in 1968. The Council's objectives are to assist creators and other copyright owners to exercise their rights effectively, raise awareness in the community about the importance of copyright, identify and research areas of copyright law which are inadequate or unfair, seek changes to law and practice to enhance the effectiveness and fairness of copyright, and to foster co-operation amongst bodies representing creators and owners of copyright.

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Executive summary

This study was commissioned by the Centre for Copyright Studies Ltd, which asked us to report on copyright legislation relating to libraries in Australia, the United Kingdom, Canada and the United States, together with any forthcoming amendments which are being made to comply with the World Intellectual Property Organization Copyright Treaty (WCT) of December 1996.

The focus of the study is how, after any amendments are completed, library copying provisions will apply in each country, particularly in relation to digital technology and electronic modes of delivery. To achieve that focus, it became necessary to understand the history of library provisions in each country. A large part of this report therefore also looks at how the library provisions in each country evolved.

As a general comment, it is interesting that, despite the newness of the digital environment, the history of adjustments to copyright which have occurred as a result of reprographic technologies continues to play a large part in the debate about library provisions in each country.

A number of other points are also clear.

Firstly, special provisions within copyright law for libraries are comparatively recent in each of the jurisdictions studied.

Secondly, library provisions can largely be characterised as contingent on very particular historical or geographic circumstances.

Thirdly, and relatedly, reviews concerning library provisions have often been accompanied by comments to the effect that the continuation of the particular exception being recommended should periodically be reviewed.

Fourthly, while Australia has been very proactive in amending its copyright laws to ensure that library provisions apply in the digital environment, the United Kingdom, Canada and the United States are taking a cautious approach to allowing libraries to distribute material in digital form, or allowing libraries to access material which copyright owners choose to protect technologically.

Fifthly, Australia has a comparatively generous set of library provisions.

Sixthly, Australia has tended to look to detailed legislation to elaborate how libraries may deal with copyright material, while other countries have tended to allow industry codes and agreements (including licensing agreements) to develop.

Australia passed amendments to its Copyright Act to allow various digital uses of copyright material by libraries after this study commenced. These amendments operate from 4 March 2001, soon after this report is published. While this study may therefore appear to come after the horse has bolted in Australia, a review of the operation of the

provisions is to take place no more than three years after that date,¹ and we hope that this study will contribute to the review discussions.

A report such as this might therefore be treated in two very different ways. Library interests in Britain, Canada and the United Kingdom might well use it to argue that the rest of the world is seriously out of step with the way the digital library is being nurtured in Australia. Copyright owners, however, both in Australia and elsewhere, might suggest that Australia is out of step with the rest of the world.

¹ Hon Daryl Williams, Attorney-General, second reading speech on the Copyright Amendment (Digital Agenda) Bill 1999, House of Representatives, *Hansard*, 2 September 1999, at 9752.

Part 1: Introduction

The basic framework for copyright varies little between countries. This is largely a result of the number of countries which adhere to copyright treaties such as the Berne Convention and TRIPs (Trade Related aspects of Intellectual Property, a part of the General Agreement on Tariffs and Trade). However, the way each country approaches what might be called the day-to-day workings of copyright varies enormously.

If the basic tenet of copyright is that creators have rights over what they create, then each country has made different adjustments to that proposition to take into account counter-weighting arguments of public interest. The way countries approach these adjustments are mediated within each culture in slightly different ways, even given the international nature of copyright and growing globalisation.

Among the adjustments national laws make are provisions giving special exceptions to libraries,² and it is surprising just how different library provisions are in the four countries we have studied for this report, countries which share a common legal heritage. As digital technology has become widely available, debate has grown as to what adjustments to copyright rights are appropriate. Particularly, debate has grown as to the proper scope and operation of library provisions.

In some ways, this debate is a reprise of that which accompanied the adoption of reprographic reproduction systems by libraries. Indeed, during the course of this study, it became increasingly clear that the debate about the interrelationship of copyright and library provisions in the digital environment could not be understood without an examination of how the various library provisions evolved in each jurisdiction. This is because the pre-digital shape of library provisions greatly influences the types of considerations which countries have taken or are taking into account when analysing how copyright should apply in a digital environment. When discussing the library provisions in each country, we therefore provide information on how library provisions have evolved. We also generally provide an outline of the findings of the various reviews and enquiries on copyright in that jurisdiction as they relate to libraries.

It is important to bear in mind that the library sector is made up of various strands, including public, corporate, research, government and educational libraries. Also, under many countries' laws, archives, galleries and museums are able to take advantage of library provisions. It is also important to bear in mind the extent to which the form of libraries has evolved over time – from a repository of bound paper on shelves, to digital collections available from terminals, and including the growing concept of “the networked library”.³ Similarly, the potential role of libraries has evolved – from repository to information broker.

² That is, provisions in copyright legislation which allow a library to deal in specified ways with copyright material without permission from the copyright owner.

³ See for example, projects such as the LAURIN project, which is focused on digitising newspaper clipping collections with the goal of setting up a network of public clipping archives across six European

In this report we principally focus on those provisions which relate to the public library sector. In particular, we are not analysing any provisions which relate to multiple copying by educational institutions, although libraries within the tertiary sector may in some cases rely upon both library and educational copying provisions to provide copies effectively to the same recipient (a student or staff member).

We have assumed that people reading this study will have a reasonable familiarity with general principles of copyright law.⁴ If you do not have such familiarity, you will still benefit from reading this report if you bear the following points in mind:

- while there is an international framework for copyright, many of the details are worked out on a country-by-country basis, and how copyright applies in a particular country is determined by that country's national laws; and
- a copyright owner's exclusive rights include the right to reproduce all or a significant part⁵ of his or her work (for example, by photocopying or scanning or by duplicating a file); and
- a copyright owner's exclusive rights increasingly include the right to control the electronic communication or distribution of the material (for example, via websites or through email).⁶

Activities in libraries which can give rise to copyright issues include:

- supplying photocopies or digital reproductions to clients;
- copying for another library under "interlibrary loan", rather than sending the original;
- copying to replace material in the collection or to add to the collection; and
- making preservation or research copies of material in the collection.

Copyright issues can also be raised where a library makes any digital material (including material digitised by the library itself) available online, even temporarily, or if a library distributes digital material electronically. Therefore emailing copyright material to clients, other libraries or staff, or posting material to a web or intranet site, may raise

countries: Günter Mühlberger, "Digitizing Newspaper Clipping Collections", (1999) 3 *The Copyright & New Media Law Newsletter*, issue 3 at 6. See also "earl: the Consortium for Public Library Networking" at www.earl.org.uk/proposal, and "New Library: the People's Network": lic.gov.uk/publications/policyreports/newlibrary/index.html.

⁴ We would suggest, however, that you might refer to the following for general information on copyright in each country: www.copyright.org.au (Australia); strategis.ic.gc.ca/sc_mrksv/cipo/cp/copy2000.pdf (Canada); www.loc.gov/copyright/circs/circ1.html (USA); www.intellectual-property.gov.uk/std/faq/copyright/what.htm (UK).

⁵ The Australian legislation uses the phrase "substantial part", but it is important to note that in the way the word has been interpreted in the courts, substantiality is a question of quality, not quantity.

⁶ The WCT is partly concerned with this right; see further Part 3.

copyright issues. Whether libraries should be legally entitled to do any of these has become contentious.

In Part 2, we therefore set out the various positions adopted by copyright owner interests and libraries in response to digital technologies and the digital environment.

In Part 3 we give a brief overview of the WCT, as it is the international legal framework within which copyright law should develop in the new environment.

In Parts 4 to 7, we closely look at both the development and operation of library provisions in Australia, the United Kingdom, Canada and the United States. In each of these Parts we comment on library provisions which relate to the activities listed above. We include comment on a library's liability in each country for providing self-service copying equipment, such as photocopiers, and the issue of whether libraries can access digital material where copyright owners have attempted to control access through the use of technological protection measures (such as passwords or encryption). We also give a brief overview of how legal deposit provisions work in each country.

Legal deposit is an obligation imposed primarily on publishers to give free copies of their publications to specified libraries. The purpose behind the provisions has been to ensure that a reasonably comprehensive archive of material published within a country is kept for future reference. These provisions have never been particularly popular with publishers, but will become even less popular where a deposit copy might be copied and the copy distributed beyond the premises of the deposit library itself, as part of interlibrary supply under other library provisions.

We do not, however, necessarily comment on all provisions in each country's legislation which may relate to libraries: any provisions relating to rental or lending, or issues relating to the import or export of copyright material, are not covered.

In Part 8 we set out our conclusions.

One of the questions which emerges from the various reports and enquiries, and which lies beneath the various stances taken by copyright owner and library interests in relation to library provisions concerns the worth or cost of those provisions.⁷ Answering that question is beyond the scope of this paper. However, it is quite clear that they are of value: the lobbying by both sides to protect either rights or exceptions indicates that copyright owners and libraries attach value or worth to library provisions.⁸ Further investigation of this issue is warranted.

⁷ The whole notion of "worth" – together with the criteria or tools by which "value" or "worth" should be measured – is likely to be contentious, given that these concepts have both social and economic dimensions. We note the comment of the Franki Committee that it was not "unanimous upon the question whether the main test to be applied in considering the economic aspect is the likely effect upon the sales of published editions of a work or whether a broader approach should be taken to the question": *Report of the Copyright Law Committee on Reprographic Reproduction* (AGPS, Canberra, 1976), para 1.14 (hereafter, Franki Committee).

⁸ There are also more concrete indicators of potential worth. For example, in its response to the European Draft Directive, the Library Association in Britain collected some estimated costs of millions of pounds if

As part of this study, we contacted copyright experts in Canada, the United Kingdom and the United States to ensure that the information is accurate, and so they could alert us to any practical issues we may have overlooked when researching from the extensive written material which is available. For their comments on draft segments of this publication, we would like to thank Sandy Norman, Copyright Consultant and Adviser to the Library Association (UK), in the United Kingdom; Wanda Noel, Barrister and Solicitor in Canada; Professor Laura N Gasaway, Director of the Law Library and Professor of Law, University of North Carolina; and Frederic Haber, General Counsel for Copyright Clearance Center in the United States. Of course, responsibility for the ultimate content of this report is ours.

The law is stated as at 15 February 2001.

exceptions for single copying either under fair dealing or the library regulations for research or private study were removed from the Act. The Library Association estimates are available at: www.la-hq.org.uk/directory/prof_issues/dccris_4.html. See also the extensive economic analysis in Part IVG of National Commission on New Technological Uses of Copyrighted Works, *Final Report of the National Commission on New Technological Uses of Copyrighted Works* (Washington DC, National Commission on New Technological Uses of Copyrighted Works, 1978), at 164-189 (hereafter, CONTU, *Final Report*).

Part 2: Responses to digital technology

Material in digital form or which has been digitised can be made available, and can be accessed, instantaneously, internationally and continuously.⁹ Here we outline the stated positions and practical responses of copyright owner interests and of the library sector to digital developments.

2.1 Copyright owners

Leakage of copyright value through private, unremunerated reproductions is not new. Copyright owners have for some time been concerned that current library provisions, initially introduced as a legislative response to the problem of photocopying, also represent a significant leakage of value. However, it would be an understatement to say that copyright owners are merely apprehensive about the power of digital technology to devalue their copyright and undermine the control that they have, to date, generally been able to exercise over their material.

In response, to this perceived threat copyright owners have taken a multi-pronged approach: they have looked both to existing law and to law reform, and they have assessed what steps they themselves can take to better protect their material.

a. Litigation and law reform

A number of high-profile cases have been run to protect copyright material: witness the cases involving MP3.com¹⁰ and Napster.¹¹ While it is hard to assess how those cases have affected public attitudes to copyright, it is clear that they have raised public awareness that copyright applies in the digital environment.

Law reform in light of digital developments has already taken place in both Australia and the United States, and is in train in the European Community; an assessment of whether law reform is necessary in light of the WCT has taken place in Canada. Copyright owners have had a keen interest in the law reforms protecting their rights, and have lobbied strongly for amendments which best reflect the underlying aims of copyright.¹² In particular, copyright interests have lobbied against extending library provisions into the digital environment. The Position Paper by the International Publishers Copyright

⁹ See further Ian McDonald, *Copyright in the New Communications Environment: Balancing and Access* (Centre for Copyright Studies, Sydney, 1999).

¹⁰ *UMG Recording Inc v MP3.com Inc* (Rakoff J, District Court for Southern District of New York, 4 May 1999).

¹¹ *A & M Records Inc v Napster Inc* (No C99-05183MHP).

¹² For example, via organisations such as the Australian Copyright Council and the British Copyright Council, and also via peak organisations such as publisher and record associations.

Council reflects copyright owner concerns when it comes to libraries in the networked environment:¹³

Many national and international library groups have argued that they should be able to use digital forms of copyrighted works in the same way as they used printed versions in the past. This is a dangerous concept because it disregards the indisputable fact that digital uses are not equivalent to non-digital uses, and, when undertaken without regard for copyright, can have immeasurably harmful consequences.

A more modest approach was articulated in a third reading speech in the Canadian Senate, before Canada's 1997 copyright amendment legislation was passed:¹⁴

... the rapid proliferation of computers, the Internet and on-line information networks have come to threaten this tradition of copyright. ... Libraries and institutions such as universities also feel that they should be entitled to the liberal use of a writer's property. They speak highly of the importance of having a "free flow of information," as if writers are somehow arguing for censorship. Writers are not asking for censorship. They insist only that they be included in the profits that are being made ...

b. Contractual terms or conditions

Copyright owners are looking to contractual terms or conditions to more clearly delineate the scope of what the person purchasing or licensing the copyright material may do with what he or she is buying or hiring. This approach allows copyright owners to tailor the licence or purchase terms or conditions closely to what the client is paying for.¹⁵

¹³ Carol Risher, Association of American Publishers, *Libraries, Copyright and the Electronic Environment*, accessed at www.columbia.edu/~rosedale/position.html on 11 July 2000, where the comment is made by Emanuella Giavarra, the Project Manager of the European Copyright User Platform (ECUP), that:

This paper was distributed by the copyright discussion list of the European Copyright User Platform (ECUP-list) among European librarians. I thought it was a good idea to distribute it also among librarians in the US. During the CONFU meetings you must have come across these arguments. In Europe we were quite surprised about the position taken by the publishers.

The comments neatly demonstrate the sometimes mutual incomprehension between librarians and copyright owner interests, while at the same time indicating that the position taken by the Position Paper is not unique.

¹⁴ Hon. Janis Johnson, Canadian Senate, *Hansard*, 23 April 1997, available at <http://www.parl.gc.ca/english/senate/deb-e/94db-e.html#0.2.W54BJ2.50HS0G.0WZ49E.H1>.

¹⁵ See, generally, Pamela Samuelson and Kurt Opsahl, "Licensing information in the global information market: freedom of contract meets public policy", [1999] *EIPR* 386; Anon., *Contracts and Copyright Exemptions* (Institute for Information Law, Amsterdam, 1997); and I Trotter Hardy, "Contracts, Copyright and Preemption in a Digital World", (1995) 1 *Rich JL & Tech* (2), www.urich.edu/~jolt/v1i1/hardy.html.

c. *Technological protection measures*

Copyright owners are not looking to litigation and the law alone to prevent infringements. Many are using or investigating technological methods of protecting their material, such as:¹⁶

- encryption;
- fingerprinting (digital information – referred to as “identifiers” – is incorporated into copyright material; each original is activated by its own identifier);
- tagging (information such as the copyright notice is incorporated into the file); and
- conversion/anti-copying (which inhibits the making of further copies, or which limits copying to a specified number only).

2.2 Libraries

While copyright owners have been concerned about maintaining control over their material, libraries have been concerned that the combination of copyright and contract laws, together with the use of technological protection measures, not diminish the role they play in providing access to information.¹⁷ As with reprographic technologies, the library sector has taken strongly to digital technologies, and the sector is generally looking to use the new technologies to better enable clients to access material in their collections or in the collections of other libraries. The library sector has been lobbying strongly towards that end.¹⁸

¹⁶ This list is drawn from the *Final Report* of the Copyright Sub-Committee of the Information Highway Advisory Council in Canada, 1995, unpaginated, *Chapter 10 --Administration Enforcement: technology*.

¹⁷ See generally Sandy Norman, “The Electronic Environment: the Librarian’s View”, [1996] *EIPR* 71 and the statement prepared by the Library Association and the JCC working party on Copyright, at www.la-hq.org.uk/directory/prof_issues/pospaper.html.

¹⁸ National, international and pan-European library associations, and other representative bodies such as the Australian Digital Alliance and, in the USA, the Digital Futures Coalition, have lobbied for reform. Some organisations seem to be informed by more radical perspectives than others: the website for the International Federation of Library Associations and Institutions (IFLA), at www.ifla.org/II/copyright.htm#collections, contains very wide-ranging links to resources. From that page, the Association of Research Libraries in the United States has taken but three articles, by John Perry Barlow, Esther Dyson and Nicholas Negroponte, each of which is strongly anti-copyright: arl.cni.org/scomm.copyright/IFLA.html. See also the IFLA site for its position on how library provisions should be drafted in the digital environment: www.ifla.org/V/press/copydig.htm.

Part 3: WIPO Copyright Treaty 1996

In December 1996, a Diplomatic Conference was held under the auspices of WIPO. The Conference agreed on the wording for two treaties dealing with copyright: a Copyright Treaty (WCT) and a Performances and Phonograms Treaty (WPPT). Each treaty aims to set levels of protection for copyright material in the evolving digital environment.¹⁹ The treaties therefore provide a vital background to the discussion of library provisions in different countries, as those provisions are revisited to take into account digital reproduction and communication.

In none of the jurisdictions on which we report has the WCT itself been the *cause* of any moves to amend copyright legislation: in each country, any discussions concerning the amendment of domestic law have arisen as a result of the emergence of the digital environment itself. Nonetheless, given that all the countries discussed in this report either have or are intending to sign the treaty, the WCT both reflects the collective perception of governments and international bodies such as WIPO that there is a need to establish international norms in relation to copyright in the digital environment and provides the latest views on how countries should approach the role of copyright in a digital environment.

One important aspect of the treaties is the agreement on a new right of “communication to the public”, which covers online transmissions, such as those made over the Internet. In the WCT, this right includes a right of “making available”, which is intended to cover activities such as putting copyright material onto a website. In addition, the treaties require countries to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures”. Further, the treaties require signatory countries to provide remedies against people who remove or alter electronic rights management information, or who distribute material in relation to which electronic rights management information has been altered or removed.

The treaties also require countries to meet the “three-step” test for any limitations and exceptions to the exclusive copyright rights.²⁰ This test provides the international touchstone as to when a country may legislate for a particular activity or dealing with copyright material to occur without the permission of the copyright owner. The three steps are that the exception must:

- be confined to certain special cases;
- not conflict with a normal exploitation of the work; and

¹⁹ The text of the treaties, together with information on which countries have signed, and acceded or ratified, is available via the WIPO website at wipo.int. Agreed Statements on the treaties are also available from the site.

²⁰ See article 10 of the WCT and Article 16 of the WPPT.

- not unreasonably prejudice the legitimate interests of the rights owner.²¹

A leading commentator on international copyright treaties has pointed out that the word “special” in the first of these steps means that “the use is justified by some clear reason of public policy or exceptional circumstance”.²² The second step requires a clear understanding of what constitutes a “normal” exploitation of the copyright material. The same commentator also notes that the third step becomes relevant only if the normal exploitation of the material is *not* threatened by the proposed exception.²³

²¹ This same test is set out as part of the two leading international treaties dealing with copyright: the Berne Convention and TRIPs (Trade-Related aspects of Intellectual Property), a component of the General Agreement on Tariffs and Trade (GATT).

²² Sam Ricketson, *The Berne Convention for the protection of literary and artistic works: 1886–1996* (Centre for Commercial Law Studies, Queen Mary College, London, 1987) at 482–483.

²³ Ricketson, loc. cit.

Part 4: Australia

4.1 General framework and background

Copyright in Australia is governed by the Copyright Act (1968), which is federal legislation. The 1968 Act was closely modelled on the United Kingdom's 1956 Copyright Act, and replaced the Copyright Act 1912 (Cth), which was also based on British legislation. The 1968 Act has been amended numerous times, including in 2000, when Parliament passed the Copyright Amendment (Digital Agenda) Act to deal with copyright as it applies in the digital environment.²⁴ The amendments in that Act operate from 4 March 2001.

Library copying provisions are found in two separate locations in the Act – in one location, the exceptions which apply to “works” (that is, literary, dramatic, musical and artistic works) are found, and in the other are those which apply to “other subject matter”, such as films and sound recordings.²⁵ In general, the provisions which apply in relation to “other subject matter” have a more limited application than those which apply to “works”.²⁶

The Australian library provisions have their origin in the Spicer Committee Report of 1959. The Spicer Committee was asked to report on what alterations should be made to the Copyright Act 1912. It noted:²⁷

in the last thirty years or so, not only has the number of reference libraries grown far beyond what existed in 1911, but modern techniques of copying by photo-mechanical means have brought about an enormous increase in the demand by students and others for copies of copyright material held in libraries.

Accepting representations from the Australian Library Association (ALA), the Committee recommended the introduction into Australian copyright law of various exceptions allowing libraries to copy for students and for other libraries. Interestingly, the Committee's report noted that the submissions from the ALA included “certain extensions” to the library copying provisions introduced in Britain in its 1956 Act. The Committee noted that the ALA had recommended these extensions on the basis partly of

²⁴ We generally refer to the amendments made by this Act as the Digital Agenda amendments.

²⁵ Sections 49 to 53 deal with copying of works; sections 110A and 110B deal with copying of other subject matter. Sections 203A to 203H deal with various procedural and administrative matters.

²⁶ For a general overview of the library and archive copying provisions, see the Australian Copyright Council's information sheet *Libraries (non-profit): introduction to copyright*, available on its website at www.copyright.org.au. For more detailed information, see its two practical guides *Non-profit Libraries: Digital & AV Resources*, and *Non-profit Libraries: Print Resources*.

²⁷ *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (Commonwealth Government Printer, Canberra 1959) para 130 (hereafter, Spicer Committee). The recommendations of the Committee were generally adopted into what became the Copyright Act 1968.

“what it considers inadequacies in the 1956 Act, and partly on differences in the pattern and organization of libraries in Australia and the United Kingdom”.²⁸

Provisions allowing libraries to copy “works”, similar to those recommended by the Spicer Committee, and based on the United Kingdom provisions, were introduced into Australian law by the 1968 Act.²⁹ Library provisions are thus a comparatively recent feature of Australian copyright law.

The scope and operation of these reprographic copying provisions in the Act were examined by the Copyright Law Committee on Reprographic Reproduction (“the Franki Committee”), which reported in 1976. The reference to the Committee was given by the government at a time when, as the Committee noted in its opening comments, “the past ten years [have] brought about a very considerable change” both in the methods of reprographic reproduction and in the cheapness and wide availability of reprographic equipment.³⁰ The Committee examined how the Act should operate in relation to photocopying generally, including in relation to photocopying by educational institutions and government, as well as libraries.

From the submissions to the Committee, it is clear that the day-to-day operation of the library provisions, as enacted in 1968, were of concern to libraries, while the fact that they were free irked copyright owners.³¹ In relation to some of its recommendations for library exceptions, the Franki Committee noted that it had been influenced by:³²

[the] unavailability of texts in Australia and the unreliability of delivery when texts are ordered from overseas. We feel that in this respect Australia is at a serious disadvantage compared with many other countries ...

The Committee also noted that it “had regard to the facts that Australia is geographically isolated from the major centres of scientific and industrial research and that the vast area of the Australian continent raises special problems in relation to the dissemination of information, particularly in the remoter parts”.³³ Most of the Franki Committee’s recommendations concerning the library provisions were later reflected in amendments to the Act: for example, a non-exhaustive definition of “reasonable portion” was introduced into the Act, deeming 10% of the number of pages of a published literary, dramatic or musical work to be a “reasonable portion”; the copying of entire works was permitted in a number of circumstances in the event that copies were not commercially available; a requirement that payment for copying be made was not taken up in the

²⁸ *ibid.*, para 132.

²⁹ Library provisions for “other subject matter” (that is, for films and recordings) were introduced by amendments made in 1986.

³⁰ Franki Committee, *op. cit.*, para 1.01.

³¹ *ibid.*, para 3.04.

³² *ibid.*, para 1.51.

³³ *ibid.*, para 1.37.

legislation; and a number of procedural or administrative steps to accompany copying were introduced.³⁴

In 1993, the Copyright Convergence Group (CCG) was established to report to government on what legislative changes were needed to address the new communications environment and to amend the Copyright Act to make it consistent with the Broadcasting Services Act. In its 1994 report, the CCG noted:³⁵

In recent years, the dramatic changes in the communications sector have generated growing concerns about the capacity of existing copyright legislation to cope with the new technological realities.

By 1993 it was clear to all concerned that the need for urgent amendment to the *Copyright Act*, enacted in 1968 in a communications environment now totally altered, had become pressing.

The CCG also noted the concern both copyright owners and libraries had about the effect of convergence (what we would now refer to as the “digital environment” or the “new communications environment”) on “the adequacy of library-specific provisions” in the Act in the electronic age.³⁶ The CCG had received six submissions from libraries, particularly covering: preservation copying; electronic transmission of materials for interlibrary loan; the viewing and copying of electronically transmitted material held by libraries; and legal deposit.³⁷

The CCG suggested a conference of copyright owner and user interests to discuss the relevant issues and “develop guidelines in the new environment for fair uses of copyright materials by libraries and those who use them”.³⁸ The conference never went ahead, and no co-operative guidelines were developed.

The 1995 report of the Copyright Law Review Committee (CLRC), *Computer Software Protection*, also touched on the issue of copying by libraries, recommending that the Act be amended “to ensure that libraries are able to make electronic copies (including electronic transmission of a copy stored in digital form and the loan of an electronic copy of a work on a carrier such as floppy disk) available to library users within the limits prescribed ... and subject to payment of royalties where applicable, as now apply to the making of hard copies”.³⁹

³⁴ We discuss those recommendations further at relevant points within this chapter.

³⁵ Copyright Convergence Group, *Highways to Change: Copyright in the New Communications Environment* (AGPS, Canberra, 1994) at 1. The CCG was appointed by the federal government in 1993 to report to the Minister for Justice “with proposals for legislative change to address the need for urgent and considered amendment to the *Copyright Act* ...”: loc. cit.

³⁶ *ibid.*, at 59.

³⁷ CCG, *op. cit.*, at 61.

³⁸ loc. cit. Perhaps the CCG had in mind the types of conferences which had been used in the United States: see further *Part 7: The United States*.

³⁹ Copyright Law Review Committee, *Computer Software Protection* (Office of Legal Information and Publishing, Attorney-General’s Department, Canberra, 1995), para 2.47. The Committee’s recommendation is discussed in more detail in paras 14.23–14.27. The reference to “royalties where

In response to the WCT, the government in July 1997 released a discussion paper, *Copyright Reform and the Digital Agenda*, in which, among other issues, comment was invited on whether the provisions for libraries should apply “to exempt libraries from copyright infringement in relation to the exercise of the ... proposed new ... transmission right and the right of making available”.⁴⁰ Subsequently, in the Explanatory Memorandum which accompanied the Copyright Amendment (Digital Agenda) Bill 1999, the government stated that its proposed amendments reflected “the Government’s aim that libraries and archives should be able to use new technologies to provide access to copyright material for the general community, as long as the economic rights of owners of copyright material are not unreasonably prejudiced”.⁴¹

After the Bill was introduced into the House of Representatives, it was referred to the House’s Standing Committee on Legal and Constitutional Affairs (the LACA Committee).⁴² While some of the Committee’s recommendations were adopted, the most interesting proposal, that copyright owners be given a “right of first digitisation”, was not.⁴³ The Committee noted that “given the pace of technological change, there is every reason to expect that within a short time the particular arguments regarding the capacity of libraries to act as commercial publishers may no longer be sound”.⁴⁴ The “particular arguments” referred to by the Committee related to whether or not the Bill then before Parliament would permit libraries effectively to become document delivery services on a commercial scale, “without remuneration or contractual relationships with authors”.⁴⁵

In response, the Committee proposed that libraries should not generally be permitted to digitise material to supply to *clients* unless the client was so remote that he or she could not “obtain a hardcopy of the work within four days through the ordinary course of the post”⁴⁶ or unless the copyright owner had already licensed or produced a digital version of the material.⁴⁷ Under the proposal, digital supply to other libraries would not be permitted unless or until the copyright owner had already licensed or produced a digital

applicable” appears to be a mistake, as the relevant library provisions do not depend on the payment of royalties. Further, at para 14.26 the Committee rejects the proposition that the library provisions be subject to remuneration.

⁴⁰ *Copyright Reform and the Digital Agenda* (AGPS, Canberra, 1997), para 4.66.

⁴¹ This note appears several times through the Explanatory Memorandum; for example, at para 69. Interestingly, the “Outline” of the Explanatory Memorandum states that “libraries, archives and educational institutions, are concerned about being able to obtain reasonable access to copyright material available on the Internet”. This gloss on the amendments is misleading: in our view, none of the amendments has this effect.

⁴² The report is available via the Australian Parliament’s website at www.aph.gov.au.

⁴³ References to first digitisation in the amendments passed by Parliament relate only to where a “first digitisation” infringes copyright.

⁴⁴ LACA Committee, *op. cit.*, at 2.76.

⁴⁵ *ibid.*, 2.65; the relevant arguments are summarised by the Committee at paras 2.65-2.68.

⁴⁶ *ibid.*, para 2.19.

⁴⁷ *loc. cit.* The Committee recommended that what it termed the “right of first digitisation” should apply in a way that, except for certain exceptions, would not allow anyone to digitise material from hardcopy unless and until the copyright owner had done so: see generally *ibid.*, paras 2.15–2.23.

version.⁴⁸ As noted, however, none of these proposals was adopted by the government or Parliament.

We should also note that in 1995 the CLRC was reconstituted by the then Minister for Justice, and given a reference to inquire into and report on, inter alia, how the Australian Copyright Act might be simplified, with particular attention to simplification of the "various provisions and schemes that provide exceptions to the exclusive rights comprising copyright".⁴⁹ The CLRC reported on exceptions to the Act, including the library provisions, in September 1998. The report made a number of recommendations in relation to library provisions, including that:

- royalty-free library exceptions be retained in the Act, but in a simplified form;
- royalty-free copying, within the scope of the exceptions, be available to all libraries, whether or not operated for profit;
- the requirements relating to the making of declarations, necessary in relation to many of the library provisions, be removed;
- the library provisions be expanded to permit libraries to copy on behalf of clients in all instances where the client him or her self could copy as a "fair dealing" (which the CLRC recommended should itself be amended to an open-ended exception, which would approximate the "fair use" approach under US law);
- interlibrary copying be governed by the amended "fair dealing" considerations rather than a specific provision, as in the current Act;
- copying of audiovisual material by libraries be regulated by "fair dealing", rather than by the very specific and relatively narrow exceptions which currently apply.

The recommendations would, if adopted, greatly change the way library provisions operate in Australia. However, the government has yet to respond to the report.

⁴⁸ The Committee noted that the exceptions it proposed were "limited": *ibid.*, para 2.19. In the library context, however, the proposed exceptions were reasonably broad, covering, for example, copying manuscripts and other original material for preservation purposes or research in that or any other library; replacement of a "reasonable portion" of lost, damaged, stolen or deteriorated published material, or of more than a "reasonable portion" if the item was not available commercially; making reproductions for internal administrative purposes. For the meaning of "reasonable portion", see footnotes to 4.4.a *Copying published material for a client's research or study*.

⁴⁹ Reference paragraph 1(a) of the terms of reference, reprinted in Appendix A of the CLRC's *Simplification Report, Part 1*, op. cit. at 213.

4.2 Position in relation to the WIPO treaties of 1996

At the time of writing, Australia had not signed either of the 1996 WIPO treaties. As noted above, however, with the Digital Agenda amendments, Australia has made most of the necessary amendments to its legislation to enable it to sign and ratify the WCT.⁵⁰

The government's policy in amending the Act to give copyright owners rights and protections consistent with the WCT would also ensure that exceptions in the Act were amended. Thus, as a result of the Digital Agenda amendments, from 4 March 2001, libraries and archives may generally digitise and communicate copyright material (for example, by email) for the purposes for which that material could, to date, be copied.

4.3 Which libraries may rely on library provisions?

Both libraries and archives may rely upon the exceptions which, for the purposes of this study, we have termed "library provisions".

The Act does not contain a definition of the word "library". It is clear, however, that a "library" may be a collection of material other than printed publications.⁵¹ Libraries run for profit may not rely on the provisions relating to copying for clients and copying for other libraries. Under section 18, a library which is owned by a business conducted for profit may, however, rely on the library provisions, provided that the library itself is not established or conducted for profit.⁵² This stems from the Spicer Committee's acceptance of a submission from the ALA that "special libraries" (that is, libraries established in "industrial concerns") "frequently have requests for copies of material in technical periodicals".⁵³ Libraries run for profit may rely on the library provisions other than those dealing with interlibrary copying and copying for clients.

When first introduced into Parliament, the Copyright Amendment (Digital Agenda) Bill 1999 proposed a repeal of section 18, and provided for the following definition of "library" to be inserted into the Act:

... includes a library owned by an educational institution, being an institution that is conducted for profit, but does not include a library owned by any other person or body carrying on business for profit if the person maintains the library mainly or solely for the purposes of that business.

⁵⁰ To date, the Digital Agenda amendments have been the principal vehicle for bringing the Australian Act into compliance with the treaty. Some additional amendments are required before Australia can sign or ratify the treaty (for example, the duration of copyright in photographs must be extended).

⁵¹ There are specific provisions for the copying of audiovisual material and artistic works.

⁵² Section 18. In the Spicer Committee report, *op. cit.*, para 145, interlibrary copying on behalf of libraries in commercial establishments was not seen as problematic because of the Committee's recommendation that no interlibrary copying occur without the consent of the copyright owner "where his [sic] name and address are known or can reasonably be ascertained". When this procedural proviso was later removed from the 1968 Act, there was no corresponding amendment to limit the ability of libraries in commercial establishments to request interlibrary copies within the purposes allowed by that section.

⁵³ Spicer Committee, *op. cit.*, para 137.

The amendment would have meant that some libraries which currently rely on the library copying provisions would no longer be entitled to do so – such as libraries in commercial organisations and businesses. The proposed amendment was strongly opposed by libraries. On the other hand, some organisations representing copyright owners argued for an even narrower definition than the one in the Bill – a definition that would exclude libraries in for-profit educational institutions.⁵⁴ The Legal and Constitutional Affairs Committee in the House of Representatives recommended that the new definition be omitted, “pending further consultation with affected parties and consideration of the Copyright Law Review Committee’s [simplification] report”.⁵⁵ The proposed definition was therefore removed from the Bill, and section 18 was retained.

Libraries in educational institutions, as well as in government, may rely upon the library provisions. However, the purpose for which a copy is made may mean that copying by the library should more appropriately be done under the educational or government copying provisions.⁵⁶

The word “archives” is defined by reference to several named archives and Public Record Offices, and also as “a collection of documents or other material”, provided:⁵⁷

- a) [the] collection of documents or other material of historical significance or public interest that is in the custody of a body, whether incorporated or unincorporated, is being maintained by the body for the purpose of conserving and preserving those documents or other material; and
- b) the body does not maintain and operate the collection for the purpose of deriving a profit.

A note added to the definition of “archives” by the Digital Agenda amendments clarifies that museums and galleries “are examples of bodies that could have collections covered by this definition”, and that therefore these types of bodies may rely upon the library provisions.⁵⁸

4.4 Dealing with copyright material on behalf of clients

The Spicer Committee recommended that the Act contain provisions allowing libraries to copy for students. The Committee reasoned that, “subject to certain safeguards, students

⁵⁴ LACA Committee, *op. cit.*, paras 2.43–2.44. The organisations included a number of the collecting societies, the Australian Publishers Association, the Australian Society of Authors and the Australian Copyright Council.

⁵⁵ LACA Committee, *op. cit.*, Recommendation 2, discussed para 2.41ff.

⁵⁶ The educational copying provisions are mostly set out in Part VB of the Act; sections 183 and 183A deal with copying by government “for the services of” government.

⁵⁷ The meaning of “archives” is set out in sections 10(1) and 10(4).

⁵⁸ Amended section 10(4).

should be entitled to the benefit of the modern means of copying that science has made available”.⁵⁹

The Australian provisions do not allow a library to deal with copyright material on behalf of a client in every way in which a client him or her self may deal with the material under the “fair dealing” provisions.⁶⁰ There are, however, two principal situations in which libraries may make copies of copyright material on behalf of clients:

- where the client requires certain categories of published material for his or her research or study; and
- where the client wants to consult a manuscript or original artwork within the library premises, or where the client of a university or similar library wants a copy of an unpublished thesis or similar work.

Following the Digital Agenda amendments, the relevant provisions may only be relied upon when the material is in the library’s collection.⁶¹

In its 1976 report, the Franki Committee argued, *post facto*, that the provisions dealing with copying on behalf of library clients have several justifications:

- libraries often find it inconvenient or impractical to lend physical items such as issues of journals;
- even where a library is prepared to acquire its own copy, it may often be unavailable;
- a library purchasing several copies of the one item would not satisfy the needs of clients, who will often want their own copies; and
- a library could not predict how many copies of material it would need to purchase.⁶²

⁵⁹ Spicer Committee, *op. cit.*, para 135. Interestingly, the Committee’s discussion of the recommendation is framed by reference to “students” (that is, by reference to the identity of the person requesting the copy), while the provisions in the United Kingdom Act which the Committee was then discussing focus on the *purpose* for which the copy is required.

⁶⁰ “Fair dealing” under Australian law covers dealings with copyright material for the purpose of research or study; criticism or review; reporting the news; and, for works, giving professional legal advice: sections 40–43, and 103A–103C. It is not clear whether, under Australian copyright law, a person may appoint another person to act as an agent on his or her behalf to deal with copyright material under the “fair dealing” provisions. However, in *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, the court held that it is the purpose of the person making the dealing which is critical: see Gail Fulton, *Fair Dealing in the Digital Age*, updated by Libby Baulch and Ian McDonald (Australian Copyright Council, Sydney, 1998) at 25, especially footnote 130, and Copyright Law Review Committee, *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (AusInfo, Canberra, 1998), paras 6.94–6.97 (the report is also available at www.law.gov.au/clrc/).

⁶¹ Amended section 49(1). Prior to the Digital Agenda amendments, copying more than a “reasonable portion” of a published work for a client was subject to this proviso, but copying articles or a “reasonable portion” of a published work was not.

⁶² Franki Committee, *op. cit.*, para 3.04. At para 3.13 the Committee also noted that “most writers of scientific or technical articles in journals were pleased if their articles were copied”.

a. *Copying published material for a client's research or study*

A library may copy certain amounts of *published* literary, dramatic, musical or artistic works for a client who needs the material for his or her research or study.⁶³ The Act does not contain any similar provision for audiovisual material, such as films, recorded music or talking books.

The relevant amounts of published literary, dramatic or musical works that may be copied are:

- all of an article from an issue of a periodical publication;
- more than one article from the same issue if they all deal with the same subject matter;
- a “reasonable portion” of most types of works;⁶⁴
- more than a “reasonable portion” if a copy of the work is not available within a reasonable time at an ordinary commercial price.⁶⁵

Interestingly, as enacted in 1968, the Act limited the amount that could be copied for a client to a “reasonable portion” of a work other than an article: there was no provision for copying an entire work for a client.⁶⁶ It was following a recommendation of the Franki Committee that the Act was amended in 1980 to entitle a library to copy all of such a work if it was not commercially available.⁶⁷

As a result of the Digital Agenda amendments, libraries will be entitled to supply similar amounts of digital material to clients who request material for research or study, and to supply that material to them in digital form (for example, on disk) or by way of a “communication” (for example, in an email).

⁶³ There are certain administrative and procedural requirements before the library may proceed: see further 5.8 *Procedural and administrative requirements*.

⁶⁴ Generally, 10% of the number of pages or words, or one chapter, is deemed to be a “reasonable portion”; sections 10(2) to 10(2C). The deeming of these amounts does not limit the meaning of what a “reasonable portion” might be, and there is no deeming provision defining what is a “reasonable portion” of an artistic work or any work in an edition of fewer than ten pages.

⁶⁵ There are no definitions of “reasonable time” or “ordinary commercial price” in the Act.

⁶⁶ The term “reasonable portion” was not at that stage defined; the Franki Committee, *op. cit.*, para 3.17, noted that “librarians in general pointed out that what was a ‘reasonable portion’ was very difficult to determine”.

⁶⁷ The Franki Committee, *ibid.*, para 3.19, noted that the phrase “normal commercial price” would be preferable to the United States’ formulation “fair price”, so that attention would be focused on the normality rather than the fairness of the price.

b. *Copying unpublished material, manuscripts, original artworks, theses and similar works for clients*

There are several provisions which allow copying of unpublished material on behalf of clients:

- old unpublished material may be copied for research or for publication;⁶⁸
- manuscripts and original artworks may be copied for research taking place in the library or at another library;⁶⁹ and
- unpublished theses and similar works kept in a library of a university, or of a similar institution, or in an archives, may be copied for a person who needs such works for research or study.⁷⁰

Unlike the provisions discussed above in relation to published material, these provisions do not place any limit on the amount of material that may be copied.

Following the Digital Agenda amendments, in each of these cases the library may make digital copies of the material for the client, and may communicate the material to the client.⁷¹

4.5 Dealing with unpublished material

As noted above, old unpublished material may be copied and communicated for research or with a view to publication.⁷²

4.6 Dealing with copyright material for the library's own purposes

Australian libraries may deal with copyright material for several internal and administrative purposes without permission and without payment. Prior to the amendment of the Act by the Digital Agenda amendments, the relevant provisions allowed a library to copy:

⁶⁸ For works, the creator must have been dead at least 50 years; the Digital Agenda amendments remove an additional requirement that the work be at least 75 years old: sections 51(1) and 52. See also the amendments to section 110A in relation to unpublished sound recordings and films.

⁶⁹ Section 51A(1); see also the Digital Agenda amendments to section 110A in relation to unpublished sound recordings and films. See further 5.6 *Dealing with copyright material for the library's own purposes*.

⁷⁰ Section 51(2).

⁷¹ Amended sections 51(1), 51A(1)(a) and 51(2). Note, however, the restriction in the second situation: that the research must take place on the premises of the relevant library.

⁷² Amended sections 51(1) and 52. The Spicer Committee recommended the inclusion of such provisions into Australian copyright law, "the onus being on the person requesting the copy to get any further permissions that might be required": Spicer Committee, *op. cit.*, paras 147–150.

- manuscripts and original artistic works, whether published or not, to preserve the item against loss or deterioration, and for research taking place in that library or in another library (the preservation provisions);⁷³ and
- to replace an item that has been lost, damaged or stolen, or if the item has deteriorated (the replacement provisions).⁷⁴

The preservation provisions were introduced into the Act in 1980 as a result of recommendations by the Franki Committee, which was “greatly impressed by the need” for such provisions, in light of the difficulties libraries often had in finding “the person or persons in whom the copyright resides” (particularly where papers deposited by them in relation to one figure might contain a lot of third party material), and also in light of the deterioration of the paper on which much of the archival material in their collections was written.⁷⁵

The replacement provisions also result from a recommendation by the Franki Committee, but the reason for the recommendation was not articulated.

The Digital Agenda amendments extend these exceptions to allow the digital reproduction and communication of relevant material. The amendments also added three new exceptions:

- a reproduction (either electronic or hardcopy) of a work in the collection may be made for “administrative purposes”, and an electronic copy may be made available online within the premises for library staff to access for such a purpose;⁷⁶
- an electronic preservation copy of an original artistic work which is part of the collection may be made available online in the premises, if the artwork is too fragile

⁷³ Amended section 51A(1) extends the provision to include communication; see also the amendments to section 110B in relation to copying sound recordings and films for these purposes. The Franki Committee did not “make any recommendation that would specifically permit the making of a copy of an unpublished work by a librarian or archivist for a student or research worker to take away”: op. cit., para 5.07.

⁷⁴ Amended section 51A(1) extends the provision to include communication. If the library wishes to deal with more than a “reasonable portion” of a work under the exception, reliance on the provision is subject to the item not being commercially available. Unlike the Canadian legislation, the Australian legislation does not contain any definition of when a copy of the work “cannot be obtained within a reasonable time at an ordinary commercial price”, and does not deem the availability of a licence from a collecting society to mean the item is commercially available. For the meaning of “reasonable portion” under the Australian legislation, see footnotes to *4.4.a Copying published material for a client’s research or study*.

⁷⁵ Franki Committee, op. cit., paras 5.01 and 5.03; the Committee referred particularly to material in papers deposited with major institutions by public figures, which often contained third party material.

⁷⁶ Amended section 51A(2) and (3); see also new section 110B(2A) for a similar amendment in relation to sound recordings and films. The amendments to section 51 replace the section which allowed libraries to make microform copies of published material in the collection, provided the published version is destroyed. This provision was primarily intended to allow microform copying so that space could be saved within libraries.

to display, and provided people accessing the online version cannot make either any electronic or print copy from the terminal;⁷⁷

- where an electronic copy of a published work (including an article in a periodical publication) is acquired, the library may make that work available online in the library or archive premises, provided no digital reproductions or communications can be made from the terminal being used to access it.⁷⁸ It will be permissible, however, for the library or archive to allow people accessing the digital collection on-site to use equipment such as a printer, to make hardcopy reproductions of the material.⁷⁹

Neither the Explanatory Memorandum nor the Attorney-General's second reading speech in the House of Representatives set out the reasons for the introduction of the provisions to allow copying for "administrative purposes"; the phrase is not defined in the Act and no examples of what types of copying might be included within this provision were given in either the Explanatory Memorandum or the Attorney-General's second reading speech.

4.7 Dealing with copyright material on behalf of other libraries and entities

The Spicer Committee reported in 1959 on whether it would be desirable for the Australian Copyright Act to allow one library to copy for another. While allowing for some copying, the Committee was very much against allowing one library to copy an entire work on behalf of another library, on the basis that "this is a field where there is considerable risk to the copyright owner":⁸⁰

The mere fact that a work is "out of print" is not, in our view, sufficient justification for the copying of the work as it may prevent the building up of a demand for the work sufficient to justify commercially the bringing out of a new edition.

The 1968 Act addressed this issue by allowing one library to supply periodical articles and "reasonable portions" of other works to another library without reference to commercial availability, but it prohibited the supply of *more* than a "reasonable portion" of a work other than a periodical article if the supplying or the requesting librarian knew or could reasonably ascertain "the name and address of any person entitled to authorize

⁷⁷ New section 51A(3A); see also new section 110B(2B) for a similar provision in relation to sound recordings and films.

⁷⁸ New section 49(5A).

⁷⁹ The person accessing the material may be able to print certain amounts of the material under, for example, one of the "fair dealing" exceptions, such as the exception which allows individuals to make a "fair dealing" with copyright material for the purpose of research or study (section 40). In its submission to the LACA Committee, the Council of Australian State Libraries stated that "users should be able to make copies using both digital and hardcopy technologies"(CASL submission at 2, available via www.aph.gov.au).

⁸⁰ Spicer Committee, *op. cit.*, para 146.

the making of the copy”.⁸¹ This proviso, however, was removed by amendments to the Act in 1980, following the Franki Committee’s report, and replaced with a proviso relating to commercial availability, on the basis that “there is often great difficulty in communicating with the person entitled to authorise the making of a copy and that frequently communications are not answered”.⁸²

The Franki Committee principally looked to Australia’s geography as continued justification for interlibrary copying provisions.⁸³

Photocopying for the purpose of ‘interlibrary loan’ is to replace in appropriate cases the loan of a book or periodical which, particularly in a country of large area, becomes impractical for many reasons, including the time taken to transmit the work itself to the place where it is required and the cost of postage or airfreight.

... Australia could not afford to store multiple copies of little-used or unused journals on library shelves around the country ...

In addition, the costs of supplying copies to another library were, according to the Committee, “substantial”.⁸⁴

Under the current provisions, a library may make a copy of a work, or part of a work, to supply to another library for two purposes: to include in that library’s collection, or to supply to a client of that library for research or study.⁸⁵ The supplying library may generally copy and supply:

- an article from a periodical publication (or more than one if they are on the same subject matter);
- an entire work, if the work is not available within a reasonable time at an ordinary commercial price; or
- a “reasonable portion” of a work.⁸⁶

The Digital Agenda amendments allow a library to make a digitised version of a non-digitised item, and allow the communication of that copy where a copy may be made. A library may thus, for example, email the relevant material to the other library, or post it to a secure site to be transferred either to the other library’s collection or to a client.

⁸¹ Section 50(2), prior to amendment in 1980. The proviso was closely based on the United Kingdom’s 1956 Act.

⁸² Franki Committee, *op. cit.*, para 4.20.

⁸³ *ibid.*, para 4.09.

⁸⁴ *loc. cit.*

⁸⁵ Prior to the amendments in 1980, the Act did not contain any limitation on the purpose or purposes for which a copy could be supplied.

⁸⁶ This will generally be the limit where the work is available within a reasonable time at an ordinary commercial price. See the discussion at footnote 64 concerning the meaning of “reasonable portion”.

The *amount* of electronic material that may be dealt with under the Digital Agenda amendments is the same as the amounts listed above, but the provisions provide a tighter “commercial availability” test where material in electronic form is to be supplied to another library than the test which applies in relation to supplying copies of hardcopy material. Under the tighter test, a library may not copy for or communicate to another library:

- an electronic article if an electronic article is commercially available on its own; or
- a part of a work if the part required is commercially available either on its own or together with a “reasonable amount of other material”.⁸⁷

A library may also supply copies of manuscripts and other original material for research that “is being, or is to be” carried out at another library.⁸⁸

4.8 Procedural and administrative requirements

When considering what amendments should be made to Australian copyright law in 1959, the Spicer Committee recommended against replicating some of the procedures or limitations within the 1956 British Copyright Act. In particular, the Committee recommended against adopting the provision in the British legislation that libraries not copy material other than periodical articles if the name and address of a person who could authorise copying was known or could be ascertained by reasonable enquiry. While it rejected the ALA argument that the geographical isolation of Australian libraries from “the main centres of book production” would make such a provision unduly onerous, the Committee noted the compromise suggested by the Australian Book Publishers Association that, when copying for clients, the librarian be entitled to make a copy of a “reasonable part” of a non-periodical copyright work for a client, “provided that notice was given within a reasonable time to the copyright owner or publisher of the amount that had been copied”.

In recommending the enactment of this “fair suggestion”, the Committee noted as follows:⁸⁹

If this suggestion were adopted the copyright owner would be in a position to know, as far as possible, the extent to which his [sic] work was being used. If the amount of copying exceeded reasonable bounds, he [sic] could make appropriate representations to the libraries or, in the last resort, to the Government for a change in the law.

The Committee also recommended that the conditions on which material other than periodical articles could be copied should be inserted into the Regulations rather than the Act, “so that the situation can be easily rectified if it leads to abuse”.

⁸⁷ New section 50(7B).

⁸⁸ Sections 51A(1)(a) and 110B.

⁸⁹ Spicer Committee, *op. cit.*, para 142.

The potential administrative and financial burden of imposing procedures in relation to library copying has been a recurring theme in government enquiries, particularly when *licensing* of library copying has been discussed (that is, licensing for a fee). For example, the Franki Committee in 1976 noted that “the burden ... of maintaining the necessary records would be out of all proportion to any royalty reasonably payable”.⁹⁰ Nonetheless, it was as a result of recommendations by the Franki Committee that the Act was amended in 1980 to introduce a number of procedural and administrative steps for most of the library copying provisions discussed in this Part.

Initially, under the 1968 Act, the librarian “had to be satisfied” that the copy was being supplied for purposes allowed by the Act. Reading the Franki Committee report, it appears that Committee felt this may have placed too high an onus on the librarian; the Committee recommended that “it should be sufficient” for the librarian to receive “in good faith” relevant documentation from clients.⁹¹ The Committee did not articulate the basis of this recommendation.⁹²

Most of the procedural requirements relating to library copying were introduced following the Franki Committee’s report, in amendments to the Act in 1980. Now, many of the library provisions require documentation. For example, clients wanting copies of material generally need to make a written request, and declare:

- that the copy is required for the purpose of research or study;
- that it will not be used for any other purpose; and
- that he or she has not previously been supplied with a copy of the same material.⁹³

Also, where more than a “reasonable portion” is to be copied, the librarian has to make a declaration that the material is not commercially available. This documentation is also required for interlibrary copying where the item is to be supplied to a client and more than a “reasonable portion” is required. After their introduction in 1980, all documentation had to be kept for seven years; it now must be kept for four. There are penalties for making a false declaration and not retaining documentation in chronological order. Copyright owners or their agents may inspect records.⁹⁴

The Digital Agenda amendments have introduced further procedural steps: where a library *communicates* a work to a client for research or study purposes, the library must

⁹⁰ Franki Committee, *op. cit.*, para 1.39. Interestingly, the Committee’s report, *loc. cit.*, goes on to note that procedures and royalty payments would “cut down the facility which libraries now enjoy” under the Act.

⁹¹ *ibid.*, para 3.26; see *ibid.*, para 4.16 for the Committee’s similar recommendation for interlibrary supply of copies.

⁹² At 3.21 the Committee notes that “it does not seem unreasonable to require” a signed request where a library copies for a client; at 4.16 and 4.20 recommendations are made without reasons being supplied.

⁹³ Section 49(1)(a) and (b). In the case of “remote” clients, and where a request is supplied, for example, by telephone, the librarian makes similar declarations.

⁹⁴ Sections 203A–203H. For more detail, see Australian Copyright Council, *Non-Profit Libraries: Print Resources* (Australian Copyright Council, Sydney, 1999) and *Non-Profit Libraries: Digital & AV-Resources* (Australian Copyright Council, Sydney, 2000).

notify the client that the reproduction was made under section 49 of the Act; and that the work may be subject to copyright.⁹⁵ Under these amendments, a library is also required to destroy any digital copy made by it as soon as possible after the item is supplied either to a client or to another library.⁹⁶

The library provisions relating to supply to clients and supply to other libraries state that no charge other than cost recovery may be levied for supply of copies.⁹⁷ Under the charges which library organisations recommend to libraries, current as from 1 July 1997, charges for interlibrary supply of copies have been \$12.00 for journal articles of less than thirty pages, with additional levies for “Fast Track” (\$12.00) or “Premium Track” (\$24.00) services. There are additional fees for fax delivery.⁹⁸

4.9 Liability for providing self-service copying equipment

In 1975, a university was found liable for having authorised an infringement of copyright when one of the self-service photocopiers it provided within one of its libraries was used to infringe copyright.⁹⁹ Parliament subsequently amended the Act so that provided a prescribed notice is displayed either on or near photocopiers provided in or next to a library, the body administering the library cannot be held liable for authorising infringements merely on the basis that it provides the photocopiers without adequate supervision.¹⁰⁰

The Digital Agenda amendments extend the scope of this statutory protection, so that a library displaying the relevant notice or notices will not be liable for authorising an infringement merely on the basis that it has provided equipment such as scanners, computers or audiovisual recording equipment, and a client uses that equipment to infringe copyright.¹⁰¹

⁹⁵ New section 49(7A)(c); the wording for the notice is prescribed under Regulation 4D of the Copyright Regulations 1969, and is contained in Schedule 4 of those regulations.

⁹⁶ New section 49(7A)(d).

⁹⁷ It is unclear whether, in calculating “cost recovery”, libraries may factor in staff costs and overheads. See *Copyright Agency Limited v Victoria University of Technology* (1994) 29 IPR 263; on appeal (1995) 30 IPR 140 for a discussion of the phrase “for a financial profit” in the context of the educational copying provisions in the Act (Part VB). In that case, the court found that a university which took these types of factors into account in its pricing policy for the supply of photocopies to students was not supplying the copies “for a financial profit”. It is unclear whether similar considerations could be taken into account in calculating “the cost of making and supplying the copy” in the relevant parts in the library provisions.

⁹⁸ See www.nla.gov.au/aclis/illcode.html. The turnaround times for “Fast Track” and “Premium Track” services are not more than 24 or 2 hours, respectively.

⁹⁹ *University of New South Wales v Moorhouse* (1975) 133 CLR 4.

¹⁰⁰ Section 39A.

¹⁰¹ Amended section 39A and new section 104B. The notices are prescribed under Regulations 4B and 17A of the Copyright Regulations 1969, and the wording is contained in Schedules 3 and 9.

4.10 Technological circumvention devices and services

The Digital Agenda amendments provide criminal penalties and civil remedies for making, or commercially dealing in, devices and services which circumvent technological copyright protection measures (such as software to get access to password-protected copyright material).¹⁰² The Digital Agenda amendments do not, however, proscribe circumvention, *per se*.

Further, the Digital Agenda amendments provide an exception to the prohibitions against circumvention devices and services if the person designing, manufacturing or importing the device, or providing the service, receives a declaration from the customer stating that the device or service was only to be used for a “permitted purpose”.¹⁰³ A “permitted purpose” includes something done under a number of the library provisions.¹⁰⁴

4.11 Legal deposit

The Copyright Act contains a provision requiring the legal deposit of certain types of published material with the National Library of Australia.¹⁰⁵ Each State also has legislation requiring deposit of certain types of published material with various State libraries.¹⁰⁶

Copies required under these provisions are provided to specified libraries without payment.

Material deposited under legal deposit may, in the relevant circumstances, be copied either by the deposit library or for other libraries or clients. This is because the material deposited becomes part of the collection of the deposit library.

¹⁰² New sections 116A and 132(5B) and (5C). Relevant definitions are contained in amendments to section 10(1).

¹⁰³ New sections 116A(3) and (4) and 132 (5G), (5H) and (5J).

¹⁰⁴ New section 116A(7). Note that circumvention devices and services cannot be provided for use of material under the fair dealing provisions.

¹⁰⁵ Section 201: the section contains a definition of the materials to be deposited.

¹⁰⁶ For full details on legal deposit, see www.nla.gov.au/services/ldeposit.html.

Part 5: The United Kingdom

5.1 General framework and background

Copyright law in the United Kingdom is governed by the Copyright, Designs and Patents Act 1988 (CDPA), and regulations made under that Act. The CDPA contains a number of provisions which allow libraries to deal with copyright material in various ways without permission.¹⁰⁷ We discuss these further below, together with the principal regulations relevant to this study – the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989.

The CDPA superseded the Copyright Act 1956, which itself superseded the Copyright Act 1911. The current library provisions are largely based on provisions in the 1956 Act, which in turn were largely based on recommendations of an enquiry by the Copyright Committee of the British Board of Trade (the Gregory Committee) in 1952.

After noting that the “laborious nature” of hand-copying had “been an effective barrier to any gross infringement of the copyright owner’s rights or to any material decrease” in returns from publication, and that “technical developments such as contact photography or micro-photography have put into the hands of librarians, students and others means whereby this laborious hand-copying can be avoided”, the Gregory Committee identified the difficulty librarians had balancing their instinct to help clients with their obligations under copyright law as it then existed:

On the one hand [librarians] feel it a duty to be of all possible assistance to serious workers using their libraries; on the other they fear that in so doing they are being parties to what may be held in the Courts to be an infringement of copyright.

The Gregory Committee proceeded to consider the position relating to three groups of material: periodical publications of learned societies or periodical literature in general; books; and manuscripts.¹⁰⁸ The recommendations of the Committee were adopted into the 1956 Act “almost without change”.¹⁰⁹

The next major review of British copyright law was undertaken by the Whitford Committee, which reported in 1977.¹¹⁰ The Introduction of that Committee’s report noted “the improvements in the techniques by which documents can be reproduced”,¹¹¹ and an

¹⁰⁷ Interestingly, for literary, dramatic, musical and artistic works, the word “copying” in the legislation means “reproducing the work in any material form” and includes “storing the work in any medium by electronic means”: section 17.

¹⁰⁸ The various recommendations relating to these categories of material are noted in relevant places in the rest of this Part.

¹⁰⁹ Whitford Committee, *Copyright and Designs Law: Report of the Committee to consider the Law on Copyright and Designs*, Cmnd 6732 (HMSO, 1977), para 212.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*, para 22.

entire chapter was devoted to the issue of reprography generally. The Committee recommended that blanket licensing schemes be encouraged, and that as such schemes became available, the Act be amended so that relevant library provisions not apply. The Committee also recommended that individuals not be allowed to make facsimile copies for research or study.

In 1981, the government of the day issued a Green Paper entitled *Reform of the Law relating to Copyright, Designs and Performers' Protection*, which noted that the Whitford Committee's report had not been unanimous in all its views, and that "consultations carried out by the Government subsequent to publication of the report have also shown that it has had a mixed reception".¹¹² The Green Paper noted that "the Government has considerable doubts" about narrowing the fair dealing exception for research or private study in the way recommended by the Whitford Committee,¹¹³ and that "since the intention of the Government is to preserve the right of the individual student to make copies within the limit of fair dealing, it seems that the right of the library ... must also be retained".¹¹⁴ Nonetheless, the Green Paper indicated its preparedness "to consider some tightening of the [relevant] provisions ... with a view to controlling their abuse".¹¹⁵ In particular, the Green Paper notes that the library provisions "were never intended to allow systematic copying of the same material", and stated that the Government intended to ensure that the fair dealing and library provisions "are not used for the purposes of research carried out for the business ends of a commercial organisation".¹¹⁶

A White Paper, entitled *Intellectual Property and Innovation*, was subsequently presented to Parliament in 1986, and became the basis for the current Act, the CDPA. Part II of the Paper was based in part on the ideas in and public responses to the Green Paper. In relation to library provisions, the White Paper reiterated the intention to exclude the related reproduction of multiple copies of the same material from the library exception, and to exclude copying for commercial research from both the library and fair dealing provisions.

While the CDPA currently sets out the bounds of copyright in Britain, copyright law in the United Kingdom will increasingly be determined by compliance with European law, particularly once the *Directive on Copyright and certain other Neighbouring Rights* comes into effect.¹¹⁷ This adds a layer to the discussion of library provisions in the United Kingdom which does not exist in relation to Australia, Canada or the United States.

For that reason we add an additional sub-heading in the following sections outlining the particular provisions in the Directive which affect what types of provisions relating to

¹¹² Secretary of State for Trade, *Reform of the Law relating to Copyright, Designs and Performers' Protection: A Consultative Document* Cmnd 8302 (HMSO, London, 1981, reprinted 1983), para 5.

¹¹³ *ibid.*, para 6.

¹¹⁴ *ibid.*, para 7.

¹¹⁵ *ibid.*, para 8.

¹¹⁶ *loc. cit.*

¹¹⁷ The Whitford Committee, *ibid.*, para 24, was the first to refer specifically to European law, rather than merely to the international conventions.

libraries member countries of the European Community may have in their national legislation. In the sections which then follow, and which look at different types of library activities, we discuss both how the United Kingdom's current library copying provisions operate, and how some may need to be amended in line with the Directive.

As our primary focus in this publication is on copying and communication of copyright material, we do not discuss miscellaneous provisions in the CDPA which relate to lending of copyright material by libraries.¹¹⁸

5.2 Position in relation to the WIPO treaties of 1996

a. Signing, ratification and accession

The European Community has signed both the Copyright Treaty and the Performances and Phonograms Treaty, as has the United Kingdom. However, neither the European Community nor the United Kingdom have as yet ratified or acceded to either Treaty.

b. European harmonisation of laws in light of the Treaties

In December 1997, the European Commission issued a proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the information society. The Directive principally deals with matters covered by the Copyright Treaty, but also seeks to implement some aspects of the Performances and Phonograms Treaty.

Amendments to the draft were put forward by the European Parliament in February 1999, and the Commission issued an amended proposal which took into account some of the Parliament's amendments in May 2000. The Parliament and the Commission reached a formal common position in mid-2000. On 14 February 2001, the Directive passed a second reading in the European Parliament, and we understand that the Directive is to be enacted within a matter of weeks.¹¹⁹ Member countries then have a period of time in which to amend their national laws to comply with the Directive.¹²⁰

One of the Directive's principal aims is to harmonise within the European Community the way in which the rights of reproduction and communication to the public operate in the online environment, and when exceptions to these rights are permitted. The Directive also contains provisions regarding technological protection and rights

¹¹⁸ Section 40A.

¹¹⁹ The text of the Directive, and reports on its progress, are available on the European Community website (europa.eu.int/comm/internal_market/en/intprop/intprop). Useful links, including a link to a legislative history of the Directive, are available via europa.eu.int/ISPO/legal/en/ipr/ipr.html.

¹²⁰ Generally, member States have two years in which to ensure that their domestic laws comply with Directives. However, a shorter period of eighteen months applies to the Copyright and Related Rights Directive: wwwdb.europarl.eu.int/oeil/oeil_ViewDNL.ProcedureView?lang=2&procid=1350.

management information that reflect the provisions in the Performances and Phonograms Treaty.

The Directive contains an exhaustive list of what exceptions national laws may have within their domestic copyright laws. In relation to reproduction, the permissible exception in Article 5(2)(c) relevant to libraries is that member states may make exceptions:

in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage ...

The European Parliament had proposed limiting this exception to acts of reproduction for archiving and conservation purposes only, but the Council opted for “more flexibility as regards the purposes of the acts of reproduction”.¹²¹ In relation to both the reproduction and the communication right, national laws may also take into account exceptions or limitations, including:¹²²

(a) use for the sole purpose of illustration for teaching or scientific research, as long as, whenever possible, the source, including the author’s name, is indicated and to the extent justified by the non-commercial purpose to be achieved;

...

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) [*quoted above*] of works and other subject matter not subject to purchase or licensing terms which are contained in their collections;

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national laws, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

In addition, there is a general rider to all the exceptions and limitations: they may only be applied in “certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”.¹²³

There has been comment that the United Kingdom may take “at least” the full eighteen months to implement the Directive, which means it might not be until the second half of 2002 before there are changes to the library provisions in the CDPA and relevant

¹²¹ European Commission, *Communication from the Commission to the European Parliament*, SEC(2000) 1734 final, at 7 (europa.eu.int/comm/internal_market/en/intprop/intprop/news/com1734en.pdf).

¹²² Article 5(3).

¹²³ Article 5(5).

regulations. It has been stated that the principal effect of the implementation of the Directive is likely to be the creation of a licence culture to replace statutory exemptions.¹²⁴

5.3 Which libraries may rely on library provisions?

a. The current position

Under the Copyright Regulations, libraries conducted or established for profit, or which form part of or are administered by a body conducted or established for profit may not rely upon the library copying provisions in the CDPA except insofar as making and supplying copies to non-profit libraries is concerned.¹²⁵

Academic libraries and libraries in government and educational institutions may rely on the provisions, although a restriction on multiple copying might often limit the ability of such libraries to copy for students or employees.¹²⁶

b. The position under the Directive

Under the Directive, national laws may provide exceptions for reproductions made by “publicly accessible libraries”, together with similar educational establishments, museums or archives. If accepted by the European Parliament, this would mean that the CDPA would have to be amended so that libraries other than publicly accessible libraries could no longer rely on exceptions if they wanted to provide copies of material to non-profit libraries.¹²⁷

5.4 Dealing with copyright material on behalf of clients

As noted above, provisions allowing libraries to deal with copyright material in certain ways on behalf of clients were introduced into the 1956 Act as a result of

¹²⁴ See “News: Digitisation: steps out of copyright hit and miss”, on the Library Association website: www.la-hq.org.uk/directory/record/r19906/article2.html.

¹²⁵ See Regulation 3, Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989.

¹²⁶ Section 40.

¹²⁷ In an early response to the drafting of the Directive, the Library Association in Britain was concerned that the wording would exclude academic, research, school and special libraries (such as health libraries, libraries in government and libraries in the voluntary sector) from being able to rely on library provisions: www.la-hq.org.uk/directory/prof_issues/dccris_3.htm. We understand, however, that many of the types of libraries listed by the Library Association would remain entitled to rely on library provisions, given that many of these, including those in the special and voluntary sectors, will indeed remain accessible to the public.

recommendations in the Gregory Report.¹²⁸ The recommendations which were made by the Gregory Committee in relation to periodical literature were largely based upon “the arrangements which have been concluded between the Royal Society, individual Scientific Societies, and many of the publishers of scientific periodicals”.¹²⁹

[a non-profit library, archive, museum or information service] is authorised to deliver a single reproduction of a part of an issue to a person representing in writing that he [sic] desires this reproduction in place of a loan of the original document or of a manual transcription, that he requires it solely for the purposes of private study, research or review. In addition, the recipient of the copy undertakes not to sell or reproduce for publication the copy supplied and he [sic] is warned that he [sic] is liable for infringement of copyright by the misuse of the copy.

The Gregory Committee noted that similar arrangements did “not extend to periodical publications issued under other auspices than those of scientific societies”, but nonetheless believed that, “with little modification” the arrangements might be “susceptible of general application” insofar as periodical publications are concerned.¹³⁰ The Parliament adopted this recommendation in the 1956 Act.

The Gregory Committee recommended that libraries only be entitled to copy from books “an extract which does not represent an unreasonably large part of the whole work and is kept strictly to the minimum needs of the reader for the purpose of a particular study” in the event that the copyright owner cannot be traced. The Gregory Committee stated that where the copyright owner could be traced, “his [sic] permission or refusal to allow copying would settle the matter”.¹³¹ This recommendation was adopted in the 1956 Act: copying of material other than periodical literature was *not* permitted if the librarian “knows the name and address of a person entitled to authorize the making of the copy, or could by reasonable inquiry ascertain the name and address of such a person”. However, this requirement was not re-enacted into the CDPA.¹³²

¹²⁸ In weighing up the competing interests of researchers, librarians and copyright owners, the Gregory Committee recommended that subject to certain conditions, librarians be entitled to rely upon an exception if they perform on behalf of a client an action which that client him or her self might perform as a “fair dealing”: para 43.

¹²⁹ Gregory Committee, *op. cit.*, at 18.

¹³⁰ *loc. cit.*

¹³¹ *ibid.*, para 52.

¹³² Hugh Laddie, Peter Prescott and Mary Vitoria, *The Modern Law of Copyright and Designs*, 2nd edition (Butterworths, London, 1995), at 788 note that a provision similar to that in the 1956 Act was included in the Bill which eventually became the CDPA, but was removed because “it was too onerous on librarians to have to make such inquiries or seek permission before supplying such copies”.

a. *The current position*

Published literary, dramatic and musical works may be copied for library clients who require the copy for the purposes of research or private study.¹³³ The conditions on which this may occur include:¹³⁴

- the person wanting the copy must satisfy the librarian that the copy is for their research or private study, and that he or she will not use it for any other purpose;
- the client *must* be charged for the supply of the copy, and the charge must not be less than the cost of producing the copy, together with a contribution towards the general expenses of the library.

In addition, there are restrictions on the amounts and the circumstances in which material may be copied. These are:

- no more than a reasonable proportion of any literary, dramatic or musical work (other than an article in a periodical publication) may be copied; and
- artistic works may only be copied if they accompany a literary, dramatic or musical work which is being copied.

The British legislation does not define the term “reasonable proportion”, and it is a question of fact in each case as to whether or not copying any particular proportion of a work is “reasonable” in all the circumstances.¹³⁵ However, the whole of a work (other than an article in a periodical) may *not* be copied on behalf of a client under these provisions.¹³⁶

b. *The position under the Directive*

Again, the exception would be subject to the general proviso that exceptions only apply “in certain special cases which do not conflict with a normal exploitation” and “do not unreasonably prejudice the legitimate interests of the rightholder”.¹³⁷

¹³³ Sections 38 and 39 CDPA. Interestingly, the relevant Regulations (Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989) have great scope to affect the breadth of the provisions in the Act; in many cases they narrow the scope of what is in the Act.

¹³⁴ We give more information on the procedural and administrative provisions in *5.8 Procedural and administrative requirements*.

¹³⁵ We understand, however, that the British Copyright Council “has agreed that, in the case of books, a ‘reasonable proportion’ means the greater of one chapter or five percent of the book”: information from the Copyright Licensing Agency site, at www.cla.co.uk/www/fairdeal.htm.

¹³⁶ See Kevin Garnett, Jonathan Rayner James and Gillian Davies, *Copinger and Skone James on Copyright* 14th ed. (Sweet & Maxwell, London, 1999) at 9–42 and Laddie et al, *op. cit.*, at 19.7 and 19.8. Laddie et al also note, *loc. cit.*, that there is, technically, nothing to prevent an individual making serial requests for different material – for example, for more than one article in a periodical.

¹³⁷ Article 5(5).

As a result of the Directive, the provisions discussed above may need to be amended slightly.

In addition to restricting the types of libraries which might rely upon the provisions, the provision that libraries must charge for a copy, and that that charge must include a sum representing a contribution to the general expenses of the library may need to be deleted, as this could contravene the prohibition on acts of reproduction “which are not for direct or indirect economic or commercial advantage”.¹³⁸

The lack of a relevant exception in the exceptions listed in the Directive in relation to communication of material by libraries except within library premises would mean that the United Kingdom could not introduce an exception to allow libraries to communicate the copy to the client off-site (for example, by email or by making the copy available through a secure website). The preamble to the Directive states:¹³⁹

Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject matter.

The Directive does, however, permit communication within the library premises, through dedicated terminals within the premises.¹⁴⁰

5.5 Dealing with unpublished material

Dealings by libraries with unpublished manuscripts were first addressed by the Gregory Committee, which recommended that “a reasonable period of time should be allowed to elapse before any relief from the existing Copyright Law is given”.¹⁴¹ Under the recommendation, the manuscript would have to be at least 100 years old, or 50 years must have elapsed from the death of the writer, whichever is the later. Following this period, and subject to any conditions of the gift, the Committee recommended that copying be permitted, but for private purposes only. The basis for this was that a manuscript owner “in entrusting his [sic] papers to a particular library regards it as a place where his [sic] interests will be safeguarded”.¹⁴²

¹³⁸ We understand that libraries generally set charges on the basis that the “contribution to the general expenses of the library” are really related to recovering charges for overheads and staffing costs in providing the copy, and should not be seen as a way of underwriting the more general infrastructure and expenses of the relevant library.

¹³⁹ Preamble, para (40).

¹⁴⁰ Directive, Article 5(3)(n).

¹⁴¹ Gregory Committee, *op. cit.*, at 21.

¹⁴² *loc. cit.*

The 1956 Act contained a provision similar to this, although the provision as enacted applied to any unpublished literary, dramatic or musical work, and the work had to be at least 100 years old *and* more than 50 years must have elapsed from the end of the year in which the author died.¹⁴³

a. The current position

Copies of unpublished material may be made by a library for the purposes of research or private study. Also, a library may, in some circumstances, copy from a “document” of a literary, dramatic or musical work which is in the library.¹⁴⁴ This provision would cover, for example, manuscripts and typescripts deposited with the library. However, the provision is not available if the relevant librarian making the copy either is or should be aware that:

- the work has previously been published; or
- the copyright owner prohibits copying.

b. The position under the Directive

Again, the continuation of the exception would be subject to the general proviso under the Directive that any exception only apply “in certain special cases which do not conflict with a normal exploitation” and “do not unreasonably prejudice the legitimate interests of the rightholder”.¹⁴⁵

As noted above, the types of libraries which may rely upon the exception would need to be restricted.

Also, the United Kingdom would not in future be able to adopt a provision such as that introduced in Australia by the Digital Agenda amendments, to permit the material to be emailed to the client or, for example, to permit material to be accessible through a secure website, other than within the premises of the library.

5.6 Dealing with copyright material for the library’s own purposes

a. The current position

Under section 42 of the CDPA, libraries may copy from any item in the permanent collection to preserve the item, to replace it, or to make an additional copy.¹⁴⁶ The

¹⁴³ Section 7(6), Copyright Act 1956 (UK).

¹⁴⁴ Section 43, CDPA.

¹⁴⁵ Article 5(5).

¹⁴⁶ Section 42(1).

purposes for which copies may be made are thus very broad, and extend both to published and unpublished material.

However, the subsequent use that may be made of copies made in reliance upon the section is narrow: under the Regulations, the item must be kept wholly or mainly *on the premises* for reference purposes, or for loan only to other libraries or archives. Copies made under the section could therefore not generally be loaned to individuals or become part of the general lending collection.

In addition, libraries can only rely on the section if it is not reasonably practicable to purchase a copy of the item in question.¹⁴⁷ Unlike the Australian provisions, *all* material that a library wishes to copy under the provision is subject to the test of commercial availability, including journal articles.

b. The position under the Directive

As noted earlier, the Directive allows exceptions related to the reproduction of copying material under national laws for “specific acts of reproduction made by publicly accessible libraries”, provided the act is not “for direct or indirect economic or commercial advantage”.¹⁴⁸

The Directive does not allow for the electronic communication of material for internal or administrative purposes, but would permit the continued existence of analogue copying by libraries for such purposes.¹⁴⁹

Again, the continued existence of the exception would be subject to the general proviso in the Directive that it only apply “in certain special cases which do not conflict with a normal exploitation” and does not “unreasonably prejudice the legitimate interests of the rightholder”.¹⁵⁰ As also noted earlier, the types of libraries which may rely upon the exception would need to be restricted.

5.7 Dealing with copyright material for other libraries and entities

a. The current position

A library may acquire from another library an article in a periodical or the whole or part of a published literary, dramatic or musical work. This section might be relied upon to

¹⁴⁷ Section 42(2). The relevant regulation does not seem to require that the item available for purchase be new: reg 6, Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989.

¹⁴⁸ See Article 5(2)(c).

¹⁴⁹ See Article 5(2)(o).

¹⁵⁰ Article 5(5).

acquire copies of published material to add to the library's collection or to provide to a client.¹⁵¹

However, except in relation to articles in periodicals, the provision may not be relied upon if the librarian knows or could reasonably ascertain the name and address of a person entitled to authorise the copying.¹⁵² The editors of *Copinger and Skone James* note that, in addition to acquiring copies of articles to add to a collection, a library will most likely be able to rely on the exception where a publisher has gone out of business, and reasonable inquiries cannot establish who now can grant permissions.¹⁵³ This, however, would be conditional on the rights in the work not being handled by a collecting society.

The requesting library must pay the cost of supplying the copy, together with a contribution to the running expenses of the supplying library.¹⁵⁴

b. The position under the Directive

It appears that, subject to the general proviso on all exceptions that they only apply "in certain special cases which do not conflict with a normal exploitation" and "do not unreasonably prejudice the legitimate interests of the rightholder",¹⁵⁵ interlibrary copying may continue under the terms of the Directive. However, such copying would appear to have to be restricted to the circulation of copies in hardcopy form, as electronic distribution of copies between libraries does not fall within any of the permitted exceptions under Article 5(3) as currently drafted.

A number of organisations representing copyright interests and library groups were working on an agreement for model licences "to enable public libraries to make available electronic collections in a networked environment",¹⁵⁶ but we understand that the group no longer meets, having failed to agree to basic licence terms.

Also, as noted earlier, the requirement that the requesting library pay, in addition to the cost of supplying the copy, a contribution to the running expenses of the supplying library would need to be reviewed, as would the types of libraries which may participate in interlibrary copying.

¹⁵¹ Section 41. See generally *Copinger and Skone James*, op. cit., at 9–44.

¹⁵² This condition stems from a recommendation of the Gregory Committee, and was carried over into the CDPA from the 1956 Act.

¹⁵³ *Copinger and Skone James*, op. cit., at 9–44.

¹⁵⁴ Reg 5(2)(c), Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989.

¹⁵⁵ Article 5(5).

¹⁵⁶ A working group has been set up by the Publishers' Association and The Library Association, with representatives from the Authors Licensing and Collecting Society, the Copyright Licensing Agency, the Society of Authors, the Library and Information Commission, the Society of Chief Librarians, the standing Conference of National and University Librarians and the Local Government Association. See www.eblida.org/hypermil/ecup-list/0559.html and www.earl.org.uk.

5.8 Procedural and administrative requirements

a. *The current position*

Various documents are required under the UK library provisions.¹⁵⁷ For example, supply of copies to clients is dependent on a signed declaration being made by the client in which the client declares that he or she:

- will not use the copy except for research or private study;
- will not supply a copy of the material supplied to any third party; and
- is not aware that anyone with whom he or she works or studies is making, or has made, a similar request.¹⁵⁸

The writers of *The Modern Law of Copyright and Designs* note that, from the Whitford Report, it appears that non-compliance with similar administrative requirements under the 1956 Act was widespread, and comment that “whether there is better compliance with the 1989 regulations remains to be seen”.¹⁵⁹

The notes to the relevant regulations state that the signature on the declarations made by individuals requesting material for their research or study must be their “personal” signature, and that a stamp or the signature of an agent will not suffice.¹⁶⁰ It therefore appears that under the current regulations, forms could not be submitted electronically (for example, via an emailed form from a website).

As noted, the client *must* pay the library a sum not less than the cost of making the copy, together with a contribution to the general expenses of the library.¹⁶¹ This stems from a recommendation in the report of the Gregory Committee: the Whitford Committee stated that “it was assumed that the charge requirement would safeguard publishers against abuse”.¹⁶² By way of example, at the time this paper was written, the British

¹⁵⁷ See, generally, Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989.

¹⁵⁸ Form A in Schedule 2.

¹⁵⁹ Laddie et al., *op. cit.*, at 787. The writers refer to the Whitford Committee, *op. cit.*, paras 242–246. It does appear that librarians in the United Kingdom, as in the other countries discussed in this report, are far more aware of compliance now than they were when the Laddie text was published. For example, we understand that in the United Kingdom, libraries are encouraged to put up posters near photocopiers, and to provide staff training, user education, and generally to assist in encouraging compliance with copyright law. Certainly, the rise of the Internet itself has allowed for very easy access to the information about copyright provided by the Library Association: see www.la-hq.org.uk. This awareness of copyright is undoubtedly the reason why, worldwide, library organisations have been active in lobbying so vigorously for their position while copyright law is being reassessed in each country in light of digital technology.

¹⁶⁰ Forms A and B of the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989.

¹⁶¹ Sections 38(2)(c), 39(2)(c) and 41(2).

¹⁶² Whitford Committee, *op. cit.*, at para 214.

Library was supplying articles direct to *registered* customers under the library provisions for £3.80 (posted) or £5.60 (faxed); *non-registered* customers pay £7.50 (posted) and £9.30 (faxed). Higher fees apply in relation to urgent copying requests – for example, a non-registered customer pays £16.30 for a rush request faxed copy of an article.¹⁶³

b. The position under the Directive

The Directive does not address this issue. Provided an exception falls within the list of permitted exceptions, member states may presumably impose such administrative or procedural requirements as they see fit.

5.9 Liability for providing self-service copying equipment

a. The current position

We understand that there is no British case dealing with a library's liability for provision of self-service equipment, in the event that that equipment is used by a library client to infringe copyright. Commentators, however, suggest that a library may bear the same liability as was found to exist in the *Moorhouse* case in Australia.¹⁶⁴

The Whitford Committee recommended that coin-operated photocopiers within libraries be subject to a statutory licensing scheme,¹⁶⁵ but this requirement is not a part of the CDPA.

b. The position under the Directive

The Directive is not intended to address issues of responsibility for infringements. Nonetheless, two permitted exceptions within the Directive are relevant to the way general exceptions to infringement might be framed when it comes to copying by individuals (that is, by the people for whose use copying equipment in libraries is often provided). Under Article 5(2)(a) and (b), member states may make exceptions:

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;

(b) in respect of reproductions on any medium made for the private use of a natural person and for non-commercial ends, on condition that the rightholders receive fair compensation which takes account of the application or non-application of

¹⁶³ See www.bl.uk/services/bsds/dsc/pricesuk.html#.

¹⁶⁴ See Laddie et al., *op. cit.*, 19.14.

¹⁶⁵ Whitford Committee, *op. cit.*, para 273.

technological measures referred to in Article 6 to the work or subject-matter concerned; ...

As with any of the exceptions provided within Article 5, these exceptions may only be applied “in certain special cases which do not conflict with a normal exploitation of the work or other subject matter” and where the exception or limitation does not “unreasonably prejudice the legitimate interests of the rightholder”.¹⁶⁶

It will be interesting to see how the British government deals with implementing these provisions. On the one hand, the library sector might argue that clients should retain their current right to make fair dealing copies without having to pay anyone “fair compensation”, and that the exceptions requiring “fair compensation” should only apply in the event that copying is in danger of exceeding that allowed under statute or which is beyond the “certain special cases” noted in the previous paragraph. Further, the library sector might argue that in any case, it should not be the *library* which pays “fair compensation” by taking out licences with relevant collecting societies.

On the other hand, copyright owners might argue that photocopying of material by individuals does already prejudice their legitimate interests, and does conflict with a normal exploitation of the material being copied; that the list of exceptions must be read as requiring a re-think of the availability at all of a fair dealing defence related to photocopying or other reproductions where collective licensing is easily available; and that the library, as provider of the equipment, is best placed to pay for such a licence.¹⁶⁷

5.10 Technological circumvention devices and services

a. *The current position*

Under the CDPA, there are no prohibitions on the use, manufacture or provision of devices or services which might be used to circumvent technological protection measures.

b. *The position under the Directive*

The Directive contains two obligations for member states to provide “adequate” legal protection in relation to the circumvention of technological protection measures.

Firstly, national laws must provide adequate legal protection against circumvention, *per se*. Secondly, national laws must provide adequate legal protection against a variety of activities involving devices, products or components relating to circumvention

¹⁶⁶ Article 5.5.

¹⁶⁷ As discussed in the next chapter, libraries in Canada can take advantage of certain statutory protections in relation to the provision of photocopiers if they have a licence in place with one of the Canadian reprographic rights organisations.

(manufacture, import, distribution, sale, rental, advertising for sale or rental, possession for commercial purposes) and against the provision of services relating to circumvention.¹⁶⁸

Interestingly, rather than member states permitting organisations such as libraries to use or obtain hacking devices or services, the Directive takes the approach that “in the absence of voluntary measures taken by rightholders”, member states must take “appropriate measures” to ensure that rightholders provide to “the beneficiary” the means of benefiting from specified exceptions or limitations.¹⁶⁹

In other words, copyright owners who use technological measures to protect their material will be encouraged to reach access agreements with libraries, or run the risk of having the State intervene. This approach appears to avoid the danger of having a hacking “industry” develop to service organisations such as libraries, and to avoid the development (or the perception) of a hacking mentality within libraries themselves.

5.11 Legal deposit

Various pieces of legislation require publishers to deposit material with specific libraries in the United Kingdom. In the case of the British Library, deposit of books is generally obligatory. In the case of the Bodleian Library at Oxford, the University Library in Cambridge, the Library of the Faculty of Advocates at Edinburgh, the Library of Trinity College Dublin and the National Library of Wales, each library has one year from publication to notify a publisher that it requires a copy of a “book”.¹⁷⁰

Deposit copies may be treated as part of the collection of the library, and copies made from them in accordance with the provisions discussed in this chapter. Given the more restrictive scope of the UK library provisions in comparison with the ones which operate in Australia, it is likely that copyright owners would be less concerned that legal deposit in Britain, in a digital environment, will threaten sales or licensing to other libraries or institutions.¹⁷¹

¹⁶⁸ Article 6(1) and (2).

¹⁶⁹ Article 6(4): as discussed above, among the listed exceptions is the exception relating to “specific acts of reproduction made by publicly accessible libraries”.

¹⁷⁰ For further information, see Laddie et al, op. cit., at 19.15ff and *Copinger*, op cit., at 27.65ff.

¹⁷¹ See further above concerning the development of licensing schemes in relation to interlibrary digital supply of material.

Part 6: Canada

6.1 General framework and background

Copyright law in Canada is governed by federal legislation: the British North America Act 1867 conferred exclusive jurisdiction over copyright on the Federal government, which itself passed several acts dealing with copyright prior to enacting the Copyright Act 1921.¹⁷² Extensive revision of copyright occurred in 1988 (Phase I); Phase II revisions were enacted in 1997.

In broad outline, Canadian copyright law is similar to copyright law in both Australia and the United Kingdom. The Act contains a number of exceptions which are particularly drafted for libraries, archives and museums, but these provisions are by no means as complicated as the provisions for library copying which are in the Australian Act. These provisions are also very recent, having come into effect only on 1 September 1999.

The 1921 Act did not contain any library exceptions. In 1957, the issue of whether certain types of copying by librarians should constitute exceptions within the Copyright Act was canvassed in the *Report on Copyright* by the Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs. The Commissioners recommended the introduction of exceptions broadly based on those set out in the 1956 UK Act. However, at the time no action was taken to implement these recommendations or, indeed, any of the other recommendations in the report.

During the 1970s there were a series of reports which noted demands “for easier, faster or cheaper public access to copyright works”.¹⁷³ In 1971, copyright was the subject of a report by the Economic Council of Canada, following a special reference to the Council by the Federal government.¹⁷⁴ Within a wide-ranging discussion, the Economic Council’s report contained guidelines for the formulation of future policy in relation to intellectual and industrial property.

After the Economic Council’s report, an *ad hoc* Interdepartmental Copyright Committee was set up by Consumer and Corporate Affairs Canada, to consider problems and identify private and public interests, preparatory to revision of the Act. In 1977 the report of two consultants, Claude Brunet and AA Keyes, entitled *Copyright in Canada: Proposals for a revision of the law*, noted that the Economic Council’s report “emphasized the Council’s view of the critical economic importance of information, not only as a commodity with its own cost and value, but also as perhaps the most important single industry in a post-industrial society”. The consultants then noted the Economic

¹⁷² This Act did not come into force until 1924.

¹⁷³ AA Keyes and C Brunet, *Copyright in Canada: Proposals for a revision of the law* (Consumer and Corporate Affairs, Canada, 1977) at 22.

¹⁷⁴ Economic Council of Canada, *Report on Intellectual & Industrial Property* (Information Canada, Ottawa, 1971).

Council's stress on "the inter-dependence between the production, distribution and utilization of information" – important in framing an approach to both the rights of copyright owners and the role of libraries.¹⁷⁵ The Economic Council itself said as follows when discussing compensation to copyright owners for any compulsorily licensed use of copyright material:¹⁷⁶

Subject to two important qualifications, compensation should be in proportion to use and each user should pay his fair share. The two qualifications are that the system must make room for the effective operation of such institutions as libraries, which like the copyright system are a vital part of the broad, publicly sanctioned information policy of society, and the system should be so designed as to be practicably enforceable.

However, in relation to reprography, the Economic Council also made the following comments, which envisage a future when the impatience of people wanting access to copyright material is met by publishers and copyright owners themselves delivering licensed copies on demand or in limited print runs. These comments are worth quoting at length, given their early date and the way they "fill in" the Economic Council's thinking on the future role of libraries,¹⁷⁷ and given the contrast the approach taken makes with Australian responses to the tyranny of distance:

The really important message of the copying machine to publishing and its more closely allied industries is not that people will break copyright every chance they get, but rather that time is money; competition is tougher; and the customers are more impatient ... They want faster delivery, "instant" special purpose anthologies, and mixed-media packages; they are less disposed to wait while consumer demand builds up for a new edition of an "out-of-print" work; they frequently want parts of books and journals rather than whole books and journals ...

Given already-available and soon-to-be-available technology, it is hard to discern any very fundamental reason why the publishing group of industries cannot before very long meet many of these stiffer consumer demands remuneratively ...

It has been proposed that the "photo-copying problem" be met by a broader use of compulsory copyright licensing ...

We would prefer a more positive and comprehensive solution, involving perhaps the development of some kind of intermediate, independent network facility for the fast and convenient delivery of non-infringing photocopies and other short-run, produced-to-order printed materials. ...

... there seems no essential reason why, when short-run photo-copying is clearly the best way of meeting some urgent consumer demand, the publisher should not undertake to provide this service, on a remunerative basis to himself [sic] and the author ... delivery could be directly by mail from the publisher or through some bookseller, librarian or other person ...

¹⁷⁵ Keyes and Brunet, *op. cit.*, at 9.

¹⁷⁶ Economic Council of Canada, *op. cit.*, at 141.

¹⁷⁷ *ibid.*, at 162–165.

The 1977 report, *Copyright in Canada: Proposals for a revision of the law*, noted that educational institutions and libraries were pushing for special exceptions to be enacted, based on “the inconvenience and difficulties they would face in securing the necessary authorization from owners of copyright”.¹⁷⁸ However, the writers of the discussion paper recommended that the defence of fair dealing be only available to a library where the library’s client could him or her self rely upon that defence. The writers further recommended that there be no other exceptions for libraries, except in relation to importation of books and in relation to certain archival functions.¹⁷⁹

The issue of whether or not libraries might, in some circumstances, be able to deal with copyright material without permission was again canvassed in the 1984 White Paper on copyright, *From Gutenberg to Telidon*,¹⁸⁰ but a House of Commons’ sub-committee report of 1985, *A Charter of Rights for Creators*, recommended that “no exception should be provided for reproduction by libraries”.¹⁸¹ The sub-committee made the following comments:¹⁸²

It is common knowledge that a significant amount of photocopying takes place in libraries and it has been suggested that an exception for library photocopying should be introduced. The sub-Committee has sympathy with the difficulties experienced by libraries in this area, but does not feel that such an exception is appropriate. Instead, the sub-Committee considers that reproduction by libraries should be the subject of blanket licences issued by collectives following negotiation. The library community by and large accepts this approach as only fair and the sub-Committee applauds its responsible and reasonable attitude on this issue.

Perhaps the attitude of the library community in Canada is an indication of the influence, through Canada’s French connection, of a more European concept of authors’ rights on Canadian thinking. Alternatively, perhaps the proximity of Canada to the United States (which has a functionalist tradition of copyright), has created a heightened awareness of the bases for copyright in Canada.¹⁸³

... the US law is founded on the principle that copyright is a tool ‘to promote the progress of science and useful arts’. ... According to that principle, the goal of copyright in the US is to be an incentive for the disclosure and publication of works.

¹⁷⁸ Keyes and Brunet, op. cit., at 145.

¹⁷⁹ *ibid.*, at 166.

¹⁸⁰ Hon Judy Erola and Hon Francis Fox, *From Gutenberg to Telidon: a White Paper on Copyright* (Minister of Supply and Services, Ottawa, 1984), hereafter “1984 White Paper”.

¹⁸¹ *Charter*, op. cit., at 22; in its 1986 response to the *Charter*, the government agreed in principle with the recommendation that there be no special reproduction exception for libraries.

¹⁸² Sub-Committee on the revision of copyright of the Canadian House of Commons Standing Committee on Communications and Culture, *A Charter of Rights for Creators* (Minister of Supply and Services, Canada 1985) at 21.

¹⁸³ Copyright Sub-Committee of the Information Highway Advisory Council, *Final Report* (1995), unpaginated, under the heading “Chapter 9(c) *Fair dealing on the Information Highway*”, available at strategis.ic.gc.ca/SSG/ih01092e.html.

The Canadian Act is based on very different principles: the recognition of the property of authors in their creation and the recognition of works as an extension of the personality of their authors.

In March 1994, an Advisory Council on the Information Highway was formed by the then Minister of Industry. Recognising the role of copyright on the Information Highway, one of the Working Groups of the Advisory Council, the Working Group on Canadian Content and Culture, formed a Copyright Sub-Committee in August 1994. A preliminary draft Report of that Sub-Committee was issued shortly thereafter, with the final report being issued in March 1995. Interestingly, the role of libraries in the emerging digital environment was not addressed by the Sub-Committee in the context of this study.¹⁸⁴

Nonetheless, provisions allowing a library to copy copyright material were introduced into the Act in 1997. These came into effect on 1 September 1999, together with a number of relevant regulations. In moving that the Bill which contained these provisions be read a second time in the Senate, the Hon. Philippe Deane Gigantès stated that, “While the law aims first and foremost to protect the rights of creators, it must also take public interest into account. By introducing a number of specific exceptions, [the Bill] attempts to strike a certain balance between the rights of creators and the particular needs of certain users to access protected works”.¹⁸⁵ He also stated that the exceptions “are of no benefit to the ordinary consumer, but are intended primarily to benefit non-profit institutions, libraries and persons with perceptual disabilities”.¹⁸⁶

In brief, the exceptions most pertinent to libraries *qua* libraries relate to the maintenance and management of collections; copying on behalf of clients for research or study, or for criticism or review; and importing single copies of books. In addition, libraries may rely upon an exception which limits liability where clients infringe copyright using self-service photocopying machines provided by the library on library premises.

A further revision of copyright law (Phase III), will deal with issues raised by the Internet and digitisation.¹⁸⁷ We are not aware of whether or not these further reforms are intended to affect what libraries are entitled to do under the Act.

¹⁸⁴ Copyright Sub-Committee of the Information Highway Advisory Council, *Copyright and the Information Highway: Preliminary report* (Information Highway Advisory Council, Ottawa, 1994); Copyright Sub-Committee of the Information Highway Advisory Council, *Final Report*, op. cit., available at strategis.ic.gc.ca/SSG/ih01092e.html.

¹⁸⁵ Senate Hansard, 8 April 1997, circa 1510; available at www.parl.gc.ca/english/senate/deb-e/86db-e.html#0.2.W54BJ2.WP9K7P.289D8E.62.

¹⁸⁶ loc. cit.

¹⁸⁷ See Senate Hansard of 21 April 1997:

“Your Committee notes that Bill C-32 is the result of nearly ten years of negotiation and consultation. It is, moreover, the second phase of an ongoing review process. Phase III is to deal with copyright issues related to the Information Highway. Given the current context of rapid technological change in communications, especially the rapid growth of digital delivery systems and the Internet, Bill C-32 may prove inadequate to deal with copyright issues in the very near future. Your Committee believes that, in order to avoid possibly protracted and

6.2 Position in relation to the WIPO treaties of 1996

Canada has signed both the WIPO Copyright Treaty and the Performances and Phonograms Treaty, but at the time of writing had not ratified either Treaty. We understand that Canadian copyright law is largely in compliance with the Copyright Treaty, except in relation to the following areas:¹⁸⁸

- duration of copyright in photographs where copyright is owned by a corporation;
- obligations concerning technical protection measures; and
- obligations concerning rights management information.

As discussed below at *6.10 Technological circumvention devices and services*, at the time of writing it was not known whether likely amendments to the current Act relating to technological protection measures will allow libraries to access material protected by technical protection measures such as passwords or encryption.

Neither the provisions in the current Act nor the current regulations deal with the issue of digital copying, and as noted above, while we understand that electronic issues will be addressed in future amendments to the Act, as also noted above, we are not aware of what plans the government has for amending the Copyright Act insofar as dealings with copyright material by libraries are concerned.¹⁸⁹

costly litigation, it will be necessary to undertake Phase III reforms in a timely fashion so that legislative reform can keep pace with the rapidly-evolving developments in society.

Your Committee notes that the Bill calls for a review of the implementation of the Act within five years of its coming into force. Given the divergent views that were expressed in relation to some of the Bill's provisions, your Committee recommends that the review be completed within three years of the Act's coming into force in order to monitor developments under the revised legislation and to assess progress on the Phase III revisions.

In a letter tabled with the Committee by the Honourable Sheila Copps, P.C., M.P., Minister of Canadian Heritage, the Minister made the following commitment:

"I undertake, therefore, that within three years after the coming into force of section 92(1), I shall cause to be laid before both Houses of Parliament a report on the provisions and operation of this Act, including any recommendations for amendments to this Act. This will allow sufficient time to assess the impact of the renewed Act and to bring about any changes that may be required in the new communications environment." (Letter to the Honourable Lise Bacon, Chair, Standing Senate Committee on Transport and Communications, April 21, 1997, p.2).

¹⁸⁸ See Johanne Daniel and Lesley Ellen Harris, "Discussion Paper on the Implementation of the WIPO Copyright Treaty", prepared for the Department of Industry and the Department of Canadian Heritage: available at strategis.ic.gc.ca/SSG/ipo1038e.html and at www.pch.gc.ca/culture/cult_ind/wipodp_e.htm.

¹⁸⁹ Copyright is not mentioned in the election platform of the recently re-elected Liberal Party.

6.3 Which libraries may rely on library provisions?

The exceptions which for the purposes of this study we have termed “library provisions” may be relied upon by “libraries, archives and museums”. The word “library” is defined to be

- an institution, whether or not incorporated, that is not established or conducted for profit, or that does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents and other materials that is open to the public or to researchers, or
- any other non-profit institution prescribed by regulation.¹⁹⁰

Unlike the situation in Australia, the definition clearly excludes libraries conducted in association with businesses or professional or commercial partnerships. Libraries in government and in educational institutions may, however, fall within the definition.

6.4 Dealing with copyright material on behalf of clients

Under the Act, there are three distinct situations in which library staff may copy for clients:

- where the client could copy under the fair dealing exceptions for research or private study, or for criticism or review;¹⁹¹
- where periodical articles are to be copied for a client’s research or private study; and
- for on-site consultation, where material is very fragile.

The second and third of these might be viewed as operating almost as deeming provisions: while not stating that copying periodical articles or fragile material is deemed to be fair, they effectively remove the need to enquire in these situations whether the particular dealing is or is not “fair”.

In addition, many libraries have a collective licence with one of the collecting societies which includes copying on behalf of clients.¹⁹²

We discuss each of the above situations in further detail below.

¹⁹⁰ We are not aware that any other institution has been declared to be a “library, archive or museum”.

¹⁹¹ This reflects the comments of the 1972 Royal Commission on matters relating to book publishing in Ontario, in which the Commissioners stated that “The distinction between copying by a librarian and by the user is sometimes claimed to be important legally, but it is spurious in our view”: Royal Commission on Book Publishing, *Canadian Publishers and Canadian Publishing* (The Queen’s Printer for Ontario, 1972) at 91. The provision does not, however, allow the librarian to copy on behalf of the client where the client is copying for the purpose of reporting news.

¹⁹² That is, with either COPIBEC or CANCOPY, depending on the part of Canada in which the body operates.

Firstly, however, by way of historical background, we should note that the 1957 Royal Commission's *Report on Copyright* commented on the demand for microfilm copies of material from researchers. The Commission stated that "to the extent that this kind of copying merely takes the place of the copying which the student or person carrying on the research would have the right to do himself [sic], there would seem to be a case for permitting it as fair dealing".¹⁹³ Nonetheless, the Commission went on to express concern about the ease with which microfilmed copies can be made, and that this "might lead to a serious impairment of the author's copyright unless this form of activity is carefully restricted".¹⁹⁴ While the report analysed the issues in terms of microfilm copying, the Commissioners' recommendations (which were that provisions broadly similar to those in the United Kingdom should be enacted into Canadian copyright law), related to copying generally.¹⁹⁵

However, as noted, the government did not implement this recommendation.

a. *Fair dealing copying*

Library staff may copy copyright material on behalf of a client if the client him or her self could have made the copy under a number of the "fair dealing" exceptions: namely, where the dealing is for research; for private study; for criticism; or for review.¹⁹⁶ Under the Act, the library staff in these cases expressly act as agents of the client.

The dealing must be "fair". Unlike the Australian provisions, the Canadian provisions do not contain a provision which deems a certain amount of a work to be an amount that may be dealt with "fairly". Rather, whether a dealing with a work is fair must be determined by reference to general criteria, such as those considered in various court cases. One respected Canadian lawyer recommends that individuals relying on the fair dealing exceptions, and librarians copying on their behalf, take the following factors into account:¹⁹⁷

- how much of the work has been copied;

¹⁹³ Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs, *Report on Copyright* (Ottawa, 1957) at 58–59.

¹⁹⁴ loc. cit.

¹⁹⁵ That is, similar to section 7 of the Copyright Act 1956 (UK). The Commissioners did, however, recommend that the requirement for the client to be charged for the copying should be deleted, together with the limitation, when copying something other than an article or more than a certain proportion of a work, if the librarian knew who could authorise copying (at 58–59). The Commissioners cited "delays in communication" for the second of these amendments, and generally cited "no prejudice to the copyright owner" as reasons for the library provisions that were recommended.

¹⁹⁶ Section 30.2(1). There is also a "fair dealing" exception for reporting the news, but library staff may not make copies as agents of clients in reliance upon this exception.

¹⁹⁷ Wanda Noel, *Copyright Guide for Canadian Libraries* (Canadian Library Association and the Association pour l'avancement des science et des techniques de la documentation, Ottawa, 1999), at 27–28. Similar lists are given in the Australian and US legislation, doubtless based on case law and a consideration of the "three-step test" in the relevant international treaties.

- the nature of the work copied;
- the possibility of competition between the extract or quotation and the original work;
- how the copy has been used;
- the value of what is copied; and
- whether the work has been published.

She states in relation to “the nature of the work copied” that “If people don’t need to buy the original work because of fair dealing, then the extract probably is competing with the original. Fair dealing should not harm the market for the original work.”; in relation to “the value of what is copied”, she states “If what is copied is an important part of the work, it can be ‘unfair’ to copy it, even if it is only a small part of the work”.¹⁹⁸

One could be forgiven for surmising, after reading these comments, that librarians would not feel safe in copying anything much at all under the “fair dealing” provision.¹⁹⁹ Another respected commentator takes a similarly narrow approach:²⁰⁰

Because the application of the law concerning fair dealing is dependent upon a court’s assessment of the facts in a case, a common sense approach might be that if a “very small” portion of a copyright work is being used and the use is clearly for the purposes of private study, research ... then it is *probably* acceptable to use that work. Otherwise, and if there is any doubt, you should obtain copyright permission for use of a work, or a portion thereof.

We understand that the copy supplied to the client will not be in digital form,²⁰¹ given Parliament’s clear statements when debating the Phase II reforms that issues such as the Internet will be dealt with in the Phase III revisions.

b. Periodical articles

Libraries may copy periodical articles for a client’s research or private study.²⁰²

The relevant provision distinguishes between two categories of articles: articles from scholarly, scientific and technical periodicals; and articles from newspapers or periodicals *other than* scholarly, scientific and technical periodicals.²⁰³ In the second

¹⁹⁸ *ibid.*, at 27.

¹⁹⁹ We note that *Copyright Guide for Canadian Libraries* is published by the Canadian Library Association and the Association pour l’avancement des science et des techniques de la documentation, and not by a publisher with a vested interest in a narrow reading of the provisions.

²⁰⁰ Ellen Lesley Harris, *Canadian Copyright Law*, 3rd ed. (McGraw Hill, Toronto, 2001) at 129.

²⁰¹ Noel, *op. cit.*, at 27.

²⁰² Section 30.2(2).

²⁰³ In its 1985 Report, *A Charter of rights for Creators* (that is, some 12 years before the Act was amended to allow such copying), the sub-committee on the revision of copyright of the Canadian House of Commons

category, a library may only make the copy if the newspaper or periodical was published more than a year earlier, and may not copy the material if it is, or contains, a work of fiction or poetry, or a dramatic or musical work.

The provision states that the person for whom the copy will be made must satisfy the library that he or she will not use the copy for a purpose other than research or private study, and that the library may only supply the person with a single copy.²⁰⁴

If a library wishes to copy periodical articles under this provision, it must comply with a set of procedural steps, which we discuss below at *6.8 Procedural and administrative requirements*.

Copies may be made only by “reprographic reproduction”, such as by means of a photocopier: as noted in the introductory section of this chapter, issues relating to the new communications environment will be considered with the Phase III revision of copyright law.

c. Unpublished and fragile material

The introduction of an exception for libraries to make limited numbers of copies of unpublished, out of print or otherwise unavailable material already in their collections for reference or preservation purposes” was flagged in the 1984 White Paper, *From Gutenberg to Telidon*.²⁰⁵ This recommendation was picked up by the Canadian government in its response to *A Charter of Rights for Creators* in 1986 and, as a result of the 1997 amendments, a library, archive or museum may now copy unpublished material “for the purposes of on-site consultation”, provided the original is fragile.

We discuss this in more detail below at *6.6. Dealing with copyright material for the library’s own purposes*.

d. Under licence

Much of the copying which takes place within Canadian libraries on behalf of clients in relation to material other than articles over a year old and articles in scholarly, scientific or technical journals is done under licence from one or other of the Canadian

Standing Committee on Communications and Culture stated that it hoped that any licence fees for the photocopying would reflect “the unique nature of scholarly work” (at 22). In other words, licence fees for such works should be lower than for other types of textual material, in light of the fact that they are published for publication rather than profit. It is likely also that the distinction in the Canadian legislation between scientific publication and other types of periodical material reflects the type of thinking evidenced by the Royal Society in its submissions to the United Kingdom’s Gregory Committee that “Science rests upon its published record, and ready access to public scientific and technical information is a fundamental need of scientists everywhere”(quoted in the Whitford Report, op. cit., para 213).

²⁰⁴ Section 30.2(4).

²⁰⁵ 1984 White Paper, op. cit., at 43.

reprographic rights organisations: CANCOPY or COPIBEC, depending upon the part of the country in which the library is located.²⁰⁶

There are historical reasons both for the narrowness of the library provisions in the Act, and for the widespread licensing of libraries. In early 1975, representatives of the Canadian Copyright Institute wrote to the Premier of Ontario, urging a study to be set up into “the apparent breach of copyright law by the widespread practice of photocopying copyrighted materials in educational institutions and libraries throughout the Province”.²⁰⁷ Subsequently, an interministerial committee was set up, not only to examine infringement of copyright, but also to formulate a pilot project to determine the extent of copyright infringement through illegal photocopying and “to devise and test a licensing system whereby authors and publishers would be compensated for any photocopying of copyrighted materials which takes place”.²⁰⁸ The committee recommended that the project *not* proceed, on a number of bases, including the conclusion that it would be difficult to obtain accurate data. However, the committee did state that:²⁰⁹

there is nothing to prevent the Institute from initiating a full-fledged licensing scheme through a royalty collection society ... and that, under the circumstances, it would be more desirable and more could be accomplished by the Ontario Government encouraging all provincially assisted educational institutions and public libraries throughout the Province to become involved in a workable and acceptable ... licensing scheme than to support the pilot project.

The committee placed two provisos on its recommendation: that any scheme represent the interests of authors as well as publishers; and that the educational institutions and public libraries be satisfied about the overall operation of the scheme. As a finishing touch, the report states that the “Ontario Government should also point out to these educational institutions and public libraries that failure to take part in a licensing scheme may leave them open to prosecution for copyright violation under the Copyright Act.”²¹⁰

Both CANCOPY and COPIBEC have negotiated licences with different types of libraries. Insofar as public libraries are concerned, we understand that copies may be made by various types of reprographic technologies and that libraries may send copies by “facsimile transmission”, but only to clients who are unable to attend the library in person, and to another qualifying institution. Digital copying is not permitted, and clients may only receive copies on paper (where copies are allowed to be faxed to clients, they must not knowingly be faxed to a client’s computer).²¹¹ We understand, however, that CANCOPY is planning to expand the scope of its licence to include non-commercial digital uses of copyright material in libraries and schools, and we understand that these

²⁰⁶ COPIBEC licenses photocopying of copyright print material in Quebec; CANCOPY licenses photocopying throughout the rest of Canada.

²⁰⁷ *Report of the Interministerial Committee on Copyright*, April 1976 at 1.

²⁰⁸ *ibid.*

²⁰⁹ *ibid.*, at 7.

²¹⁰ *ibid.*, at 8.

²¹¹ See Noel, *op. cit.*, at 39.

licences are likely to include individualised terms and conditions, and that contracts requiring advance permission could become the norm rather than the blanket agreements currently in place in relation to photocopying.²¹²

The licences typically do *not* extend to the copying of material such as unpublished works, workbooks, music, original artistic works, instruction manuals, letters to the editor and advertisements, and works by authors, artists, and publishers who are listed on an “exclusions list” which accompanies the licence.²¹³ However, we understand that the collecting society can often obtain authorisation for copying beyond the terms of the licence.²¹⁴

We understand that the current photocopying licences generally allow up to 10% of a published work to be copied, but more in some cases:

- a chapter from a book (provided the chapter constitutes no more than 20% of the book);
- an entire short story, play, essay, article or poem (from a publication containing other works);
- all of a report of a legal case from a publication containing law reports;
- an entire newspaper article or page;
- all of an article in a periodical (including a set of conference proceedings); and
- an entire artistic work reproduced in a book or periodical which also contains other published works.

However, while up to these amounts of relevant copyright material may be copied under the licence, there are restrictions in the event that the portion to be copied is commercially available as a separate publication, or where the copying would substitute for an item which would ordinarily be purchased.

Further, the licence does not permit certain uses of copies. For example, copies made for library clients are not to be resold, and are not to be used in association with any partisan political activities, endorsement of a cause or institution without the creator’s permission, or in association with advertising or sale of a commercial product or service.

²¹² See www.cla.ca/feliciter/45-4/newsfronts1.htm.

²¹³ See *ibid.*, at 40–41. We understand that CANCOPY and COPIBEC do not generally have authority to license these authors or types of material; any author or material other than those on the exclusions lists may be copied under the licence.

²¹⁴ See, for example, www.cancopy.com for information on CANCOPY’s transactional licences.

6.5 Dealing with unpublished material

a. *Management and maintenance of the collection*

As noted above, the introduction of an exception for libraries to make limited numbers of copies of unpublished, out of print or otherwise unavailable material already in their collections for “reference or preservation purposes” was flagged in the 1977 discussion paper, *Copyright in Canada: Proposals for revision of the law*,²¹⁵ and the 1984 White Paper, *From Gutenberg to Telidon*.²¹⁶

The 1977 discussion paper recommended only that libraries be permitted to make a copy “for the sole purpose of preserving the material which is deteriorating or damaged”.²¹⁷ In doing so it expressly recommended against amending the Act to allow publication after a certain length of time, as is done in the 1956 UK Act, or by artificially deeming permission to exhibit as the starting of time insofar as the duration of copyright is concerned (thus permitting an unpublished work eventually to fall out of copyright without the family or heirs expressly authorising publication):²¹⁸

Given the recognition of [the] basic right to choose to disclose and the need to maintain the principle of privacy and confidence, no obligation or pressure to publish should be created.

Section 30.1 of the current Act, introduced by the 1997 amendments, now provides for a range of situations in which libraries may copy material. Broadly, the section deals with “management and maintenance of [a] collection”, and thus deals with both published and unpublished material, provided the material forms part of the library’s permanent collection.

The section allows libraries to make copies if material has deteriorated or been damaged, or is at risk of deterioration, damage or loss.²¹⁹ Copies of unpublished material may also be made for on-site research²²⁰ and for various internal or administrative purposes.²²¹

While the section provides that the library must first check whether “an appropriate copy is commercially available in a medium and of a quality that is appropriate”, this requirement is likely to be irrelevant to unpublished material.²²²

²¹⁵ Keyes and Brunet, *op. cit.*, at 173–175.

²¹⁶ 1984 White Paper, *op. cit.*, at 43.

²¹⁷ Keyes and Brunet, *op. cit.*, at 175.

²¹⁸ *ibid.*, at 174.

²¹⁹ Section 30.1(1)(a) and (b) provide for the copying of both rare and unpublished material. The section also allows copying in the event that the item is lost, but for unpublished material, this will only be relevant where a copy of the unpublished item was previously made under the section. If the original were then lost, a copy of the previously made copy could be made.

²²⁰ See 6.4 *Dealing with copyright material on behalf of clients*, above.

²²¹ See 6.6 *Dealing with copyright material for the library’s own purposes*, below.

b. Material deposited in an archive

The word “archive” is given the same definition in the legislation as “library” and “museum”,²²³ and the phrase “library, archive or museum” appears throughout the library provisions. However, there is an additional provision for copying unpublished works deposited in an archive.

Under this provision, an archive can copy an unpublished work in the archive for research or private study provided the copying has not been prohibited by any owner of copyright in the material. In addition, the archive must give the person depositing the material notice that it may copy the material under the provision, and thus give the person who deposits the material, if they are the copyright owner, the opportunity to prohibit copying.²²⁴

6.6 Dealing with copyright material for the library’s own purposes

a. Copying under the legislation

Under the Act, libraries may copy material from their own permanent collections for the following internal or administrative purposes:

- internal record-keeping and cataloguing;
- insurance purposes or police investigations; and
- if necessary for restoration.²²⁵

If a library is copying for these purposes, the library does not have to check whether or not the item is commercially available. However, for the other purposes within the scope of the provision, the library may only copy, if it has first checked whether or not the item is commercially available.

Thus libraries may copy items which are rare (for example, a limited edition) if the item is deteriorating, damaged or lost, or at risk of deterioration, damage or loss. Copies may also be made in alternative formats if the original is currently in an obsolete format or the technology required to use the original is unavailable. This may be relied upon, for example, if a video were held in Beta format, and no machine were available to view it.

²²² See below for a discussion of the meaning of “commercially available” under the Canadian Act.

²²³ Section 2, “library, archive or museum”.

²²⁴ Section 30.21: this section only applies to works deposited in the archive after this section came into effect (after 1 September 1999). It appears that “maintenance and management” copying could not be prohibited by the person depositing the material unless such a prohibition forms part of an agreement relating to the deposit of the material. As this type of provision is not the primary focus of this study, we do not provide further commentary on it.

²²⁵ Section 30.1(1)(d), (e) and (f).

Under the provisions, an item will be “commercially available” if it is available in a medium and quality appropriate for the purpose for which the copy is required. For example, if the video in the outmoded Beta format were available in PAL, the library would not be entitled to make the copy.

The concept of “commercially available” includes whether a licence to make the copy may be obtained. Thus the concept of commercial availability under Canadian law is markedly different from the understanding of commercial availability under the Australian provisions. While, in Australia, a library need only check whether a *copy* (other than a second-hand copy) is available, in Canada the Act defines “commercially available” as:

- available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, or
- for which a licence to reproduce ... is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort.

The effect of the definition is that a library will often not be able to make copies under this part of the legislation.²²⁶ This is because a licence from CANCOPY or COPIBEC is likely to be available for copying most published textual material, and a licence from SODART or CARfac Copyright Collective (the Canadian collecting societies for visual arts) is likely to be available in relation to many artistic works. All these collecting societies are affiliated with a number of collecting societies in other countries. Therefore the library may only make the copy under the terms or conditions of the licence it either already has with the relevant collecting society, or under the terms or conditions of any licence which the relevant collecting society can issue in relation to the particular item. Unlike the position which applies in Australia, the Canadian library in many cases is likely to have to pay for the copy it needs.

Regulations may be made as to the procedure for making copies for any of the purposes discussed here, but as far as we are aware, no such regulations have yet been made.

b. Copying under licence

As noted above, in a number of cases, a library may not make copies of copyright material where an item is commercially available, including where a licence to copy is available from a collecting society. In general terms, Canadian libraries with a CANCOPY or COPIBEC licence may copy up to 10% of a published work within the repertoire of the relevant society,²²⁷ or more than 10% in the following cases of copying:

²²⁶ The requirement that a licence not be available from a collecting society was introduced into the 1997 amendments in the House of Commons, and was the subject of criticism in the Senate (see, for example, the speech of Hon. Noël A. Kinsella, Acting Deputy Leader of the Opposition, in his speech to the Senate on 10 April 1997, available at www.parl.gc.ca/english/senate/deb-e/88db-e.html).

²²⁷ Where a work is not within the repertoire of a collecting society (or, in practice, where material likely to be covered by CANCOPY or COPIBEC is not included on their lists of exclusions), and where copies are

- to replace damaged or missing pages in an item belonging to the library;
- to prevent the deterioration of a rare or fragile publication in a library (one whole copy may be made); and
- to replace a missing or damaged out-of-print work in the collection (one whole copy may be made).

Before copying under the second and third of these points, the library must make reasonable efforts to purchase a replacement copy, and must have notified the collecting society of its intention to rely upon the licence. The collecting society can then notify the library as to whether it is in a position to licence the relevant work.

6.7 Dealing with copyright material for other libraries and entities

The 1957 Royal Commissioners recommended the enactment into Canadian copyright law of a provision in basically the same terms as section 7(5) of the United Kingdom's 1956 Copyright Act.²²⁸ Under this recommendation, copies of articles could have been supplied to other libraries at any time upon request, but copies of published literary, dramatic or musical works (and accompanying artworks)²²⁹ could only be supplied if the name and address of "any person entitled to authorise the making of the copy" was not known or could not reasonably be ascertained.²³⁰

As noted earlier, however, this recommendation was not acted upon at the time.

The Royal Commissioners did not discuss limiting the purposes for which copies could be requested. However, as discussed below, the current provisions do specify the purposes for which a library can supply copies of copyright material to another library, archive or museum.

a. For a client of the requesting library

Generally, a library may supply copies of copyright material to another library for that library to supply to one of its clients for the client's research or private study: namely, where the client might make a "fair dealing" with the material for the purposes of research or private study or for criticism or review, or where a copy of certain types of articles is required.²³¹

not otherwise commercially available, a library may copy freely within the scope of the Act (for example, to make a copy of a rare or fragile item which is at risk of deterioration, damage or loss).

²²⁸ The Commissioners did not articulate any reasons for this recommendation.

²²⁹ Accompanying artworks were covered by section 7(9) of the British legislation; the Royal Commissioners recommended the enactment of a similar provision into Canadian law: Royal Commission, op. cit., at 59.

²³⁰ Royal Commissioners, at 59.

²³¹ See further 6.4 *Dealing with copyright material on behalf of clients*, above.

While it appears that the supplying library may, at least under the legislation, electronically supply the copy to the requesting library,²³² the provision states that the copy ultimately given to the patron “must not be in digital form”.²³³ We understand, however, that pending the Phase III revision of the Act, libraries do not supply electronic copies to other libraries.²³⁴

b. To add to the requesting library’s collection

Unlike the Australian Act, there is no general provision under which a library may have material supplied to it by another library so that it may build its collection.

The “management and maintenance” provisions, discussed above at 6.6 *Dealing with copyright material for the library’s own purposes*, do allow a library to copy material for another library. However, as these provisions relate to the management and maintenance of the requesting library’s permanent collection, they allow a library essentially to replace or protect material already in its collection. They do not allow a library to expand its collection by asking another library to provide copies of material it does not already hold.

6.8 Procedural and administrative requirements

a. Under the Act

Libraries which wish to copy material for their own clients or for the clients of other libraries must keep detailed records. The records must contain the following information:²³⁵

- the name of the library making the copy;
- the name of the requesting library, if the copy is being made for another library’s client;
- the date of the request; and

²³² While the word “copy” is used in the relevant provisions, the *Regulatory Impact Analysis Statement* which accompanies the relevant regulations (SOR/99-325) notes that “where the requested copy is transmitted electronically between two institutions, the Act specifies that the copy given to the patron must not be in digital form”. Malcolm E McLeod, “What all IP practitioners should know about Bill C-32”, (1999) 88 *Copyright World* 22 at 25 notes that “the Act nowhere authorizes the making of a faxed or digital copy from the reprographic reproduction that alone is authorised, any more than it authorises a library to download articles from an electronic database”.

²³³ Section 30.2(5).

²³⁴ See McLeod, *op. cit.*, at 25.

²³⁵ Regulation 4(1) of SOR/99-325.

- information sufficient to identify the work.²³⁶

These records may be kept in writing or in any other form from which the required information may be retrieved in intelligible written form within a reasonable time, and must be kept for three years.²³⁷ Records must be made available for inspection by an owner of copyright, or by his or her representative, or by a collective society.²³⁸

Also, copies made for clients must be stamped or otherwise marked with the following information:

- that the copy is to be used solely for the purpose of research or private study; and
- that any other use may require the copyright owner's authorisation.²³⁹

The regulations have a sunset clause in relation to record-keeping where the copying relates to copying on behalf of the client as a fair dealing for research or study or for criticism or review: these records will not have to be filled in after 31 December 2003. However, there is no sunset clause for other records which need to be kept. The relevant *Regulatory Impact Analysis Statement* notes that the sunset clause will give libraries, archives, museums and copyright owners "the opportunity to assess, over a set period of time, the costs and benefits of this particular record keeping requirement" and that "prior to the 'sunset' date, the Departments of Industry and Canadian Heritage will review the operation of this provision with affected stakeholders".²⁴⁰

The *Regulatory Impact Analysis Statement* also notes which organisations were consulted on the drafting of the regulations, and that "groups representing creators and copyright owners supported record keeping for all types of copying done on behalf of patrons of libraries, archives and museums". On the other hand, the *Statement* noted that:²⁴¹

representatives of libraries felt that records should be kept only with respect to interlibrary loans. In particular, representatives of libraries were opposed to keeping records with respect to copies made for fair dealing purposes on behalf of patrons on the same premises.

Libraries may recover costs for providing copies of published articles to clients or to other libraries for that other library's client; any charges levied for providing copies

²³⁶ Regulation 4(1) lists the type of information which would satisfy this requirement: the list includes information such as the work's title, the ISBN or ISSN and bibliographic details, as well as the numbers of the copied pages.

²³⁷ Regulation 4(3) and (4) of SOR/99-325.

²³⁸ Regulation 4(5) of SOR/99-325; see also regulations 4(6) and (7) for procedural requirements relating to such access.

²³⁹ Regulation 7 of SOR/99-325; the regulation states that the person requesting the copy may be informed "by means of text printed on the copy or a stamp applied to the copy, if the copy is in printed format, or by other appropriate means if the copy is made in another format".

²⁴⁰ 18/8/99 *Canada Gazette Part II, Vol 133 No 1*, at 2064.

²⁴¹ *ibid.*, at 2065.

under these sections may take into account overhead costs associated with providing the copy.²⁴²

Intermediate copies made for another library to give to a client (for example, a copy made to fax or email to another library, or an email attachment received by the requesting library), must be destroyed once the end client receives the copy.²⁴³

b. Under licence

The terms and conditions of the relevant licence which the library has with CANCOPY²⁴⁴ require that certain notices be put up next to self-service reprographic equipment such as photocopiers.²⁴⁵

Also, the library must maintain full records of all “maintenance” copying (such as copying rare, deteriorating or damaged material, or where the material is at the risk of becoming so) and of all replacement copying (for example, where an item has been lost or stolen or where there are missing pages). The records to be kept comprise a list or log which includes title, author, publisher, ISSN or ISBN, and the number of single pages copied. These records must be kept for five years; CANCOPY may inspect them; and they must be sent to CANCOPY if it requests them.

Where library staff make copies on behalf of clients or other institutions, they must make sure that at least one page of the copy contains the copyright symbol (“©”), and a credit to the author and the publisher, as well as to any illustrator (where these are known). The library also has to ensure that the following notice is included on at least one of the pages of the copy:

This material has been copied under licence from CANCOPY. Sale or further copying of this material is strictly prohibited.

In addition, if requested, the library has to provide reasonable access to collection holdings information, and either a print or machine-readable copy of serial holdings data if the library maintains such a database.

Under the licence, the library may not generally sell copies it makes, and it may charge no more than direct costs for copying and delivering copies in the following situations:

²⁴² Section 29.3. Archives may also charge cost recovery for providing copies of unpublished material under section 30.21. In its submission to the Royal Commission on Book Publishing, *op. cit.*, at 92, the Canadian Book Publishers’ Council noted that at that time (1972), “most libraries charge[d] from 5c to 25c per page for copies ... The only persons who are not paid are those most entitled to payment, the copyright owners”. However, we understand that the National Library does not currently charge for photocopies (or, indeed, for loans, locations or any other interlibrary loan services) supplied to a library under the ILL scheme: www.nlc-bnc.ca/pubs/ill/eillse_1.htm.

²⁴³ Similarly, an intermediate copy made for “maintenance and management” purposes under section 30.1 must be destroyed as soon as it is no longer needed.

²⁴⁴ We understand that the licence offered by COPIBEC requires similar procedures and administrative steps to be followed.

²⁴⁵ See further 6.9 *Liability for providing self-service copying equipment*, below.

- the library does not offer self-serve copiers to clients;
- a client is unable to use a self-serve copier because of a physical disability;
- the library sends a copy to a client unable to attend the library in person; or
- the library sends a copy to another library, museum, archive or certain educational institutions.²⁴⁶

6.9 Liability for providing self-service copying equipment

A library will not be liable for infringements made by clients on self-service photocopying machines on the library's premises provided:

- a “warning” notice is affixed to or within the immediate vicinity of every photocopier, so that it is both visible and legible to people using each machine;²⁴⁷ *and*
- the library has an agreement with a collecting society for licensed copying, or an agreement with relevant copyright owners where those owners' works might be copied.

The legislative protection applies only in relation to self-service photocopiers, and not to other types of copying equipment; the 1984 White Paper on copyright revision noted that libraries had stated their wish for “clarification of their legal position in connection with the public use of library photocopying machines”.²⁴⁸ The proviso that the library have an agreement with a collecting society in place was “vigorously opposed” by affected user institutions, and was subject to some debate in the Senate before the Bill was passed, but the Standing Senate Committee on Transport and Communications in its report on the 1997 amendments noted that:²⁴⁹

as collectives already exist to issue reprographic licences, the requisite licences will be readily obtainable by educational institutions and libraries.

As noted earlier, CANCOPY's licence for public libraries allows library patrons to photocopy on the premises, within certain limits. The licence was developed in consultation with representatives of the Council for Large Urban Public Libraries (CALUPL), the Provincial and Territorial Library Directors' Council (PTLDC) and

²⁴⁶ Those listed in Section 2 of the Act.

²⁴⁷ Section 30.3; the relevant minimum information that must be on each notice is set out in regulation 8 of SOP/99-325; more information may be included if appropriate.

²⁴⁸ *From Gutenberg to Telidon: A Guide to Canada's Copyright Revision Proposals* (Minister of Supply and Services Canada, 1984) at 14; see also the 1984 White Paper, op cit., at 40 and 61–65.

²⁴⁹ Senate Hansard, 21 April 1997, available at www.parl.gc.ca/english/senate/deb-e/92db-e.html#0.2.X57BJ2.ZMDMXO.T4A19E.3.

CANCOPY. The licence is a blanket licence for copying any published works *other than* those notified to the library,²⁵⁰ in return for a licence fee.²⁵¹

Under the licence, the library undertakes to “take reasonable steps to ensure that all patrons and staff using the Library’s copyright machines are aware of and follow the relevant terms and conditions of” the relevant part of the licence. Steps include placing notices with the current exclusions list, the limits on copying and information about various prohibitions adjacent to each machine. A notice encouraging users to mark copies with the names of the author and publisher is also to be placed adjacent to copiers, together with a notice requesting people using the copiers to report immediately to the relevant Board or library any allegation of copyright infringement relating to any material copied by them.

6.10 Technological circumvention devices and services

As noted at 6.2 *Position in relation to the WIPO treaties of 1996*, we understand that amendments need to be made to the Copyright Act to make it compliant with the obligations concerning technological protection measures.

At the time of writing, it was not known whether the Act would be amended only to proscribe either devices or activities which knowingly infringe copyright, or whether it would create a strict liability test.²⁵² It was also not known whether exceptions might be given in relation to certain non-infringing activities (such as fair dealings or dealings under the library provisions) or when amendments might be introduced into Parliament.

6.11 Legal deposit

Canadian publishers are obliged to deposit a certain number of their published books and other material with the National Library.

It would appear that material in the resulting collection may be copied in compliance with both the provisions in the Act dealing with libraries, archives and museums, or under relevant licensing agreements the Library might have.

²⁵⁰ The exclusions are listed in a Schedule to the relevant agreement. As noted earlier, copying is limited to works published in certain countries, and excludes, *inter alia*, copying of instruction manuals, print music, letters to the editor and advertisements in periodicals, workbooks and similar “consumable” publications, newsletters and business case studies, and government works.

²⁵¹ See www.cancopy.com/users/solutions.html#library. To assist in determining the terms of the licence, CANCOPY commissioned a study in 1996 to determine patterns of photocopying within public libraries in Canada, in order to assist in the development of the first licence for public libraries: see Anon., “What’s getting copied in public libraries?”, *Briefly from CANCOPY*, Vol 7 No 2, Summer 1997 at 2. We understand that the general licence fee which libraries pay covers copying by patrons, and by library staff for internal purposes, for clients, and for other libraries.

²⁵² See comments on Article 11 by Daniel and Harris, *op. cit.*, n.p.

In comparison with the situation in Australia, the impact on copyright owners of such deposit obligations is likely to be reasonably limited, given that under the Act, libraries may not augment their collections by having material supplied to them from other libraries, and given that, as far as we are aware, libraries are not digitising their collections or supplying copies electronically. We further understand that the current practice of the National Library in relation to interlibrary loans is, in part, as follows:²⁵³

Conditions relating to copyright, publishers' restrictions and preservation (eg. fragile items cannot be photocopied) must all be met before copying can proceed.

Written authorization with the signature of the copyright owner must accompany a request to reproduce either a substantial portion or the whole of a copyrighted document. It is the responsibility of the requester to obtain and provide this authorization.

Documents which are confidential, or restricted by the publisher may not be copied without written permission from the appropriate source. It is the responsibility of the requester to obtain and provide this permission.

²⁵³ National Library of Canada, "Interlibrary loan policy", available at www.nlc-bnc.ca/pubs/ill/eillse_2.htm.

Part 7: The United States

7.1 General framework and background

Jurisdiction over copyright is given under the US Constitution to the federal government:

The congress shall have Power ...

To promote the Progress of Science and the useful arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and discoveries ...

To make all Laws which shall be necessary and proper for carrying into Execution the Foregoing Powers ...

The first federal copyright legislation was passed in 1790; during the earlier part of the twentieth century, US copyright law was governed by the Copyright Act of 1909 (as amended); the current federal Copyright Act was enacted in 1976, although this Act has now also been amended several times, most recently by the Digital Millennium Copyright Act (DMCA).²⁵⁴

The extent to which libraries (as well as archives, offices, museums or similar institutions)²⁵⁵ might copy copyright material on behalf of researchers was at first the subject of a “gentleman’s agreement” rather than legislation. In 1935, an agreement was reached between the National Association of Book Publishers and a joint committee of the American Council of Learned Societies and the Social Science Research Council.²⁵⁶ Specific provisions relating to dealings with copyright material by libraries did not appear within the legislation until the 1976 Act.

One commentator has noted that the lack of such a provision prior to the 1976 revision “was not the result of any oversight by the Register of Copyrights, or by Congress. Nor was it caused by a lack of concern on the part of librarians, authors, and publishers, as to

²⁵⁴ 17 USC §101 *et seq*, as amended. Prior to Federal law occupying the field, and hence in practice pre-empting State law, State law regulated copyright. By 1786, all of the then States except Delaware had copyright legislation, generally based on English copyright law as it then existed: Margaret Nicholson, *A Manual of Copyright Practice for Writers, Publishers, and Agents* (OUP, New York, 1945) at 5.

²⁵⁵ In this Part, we generally refer only to “libraries”, for the sake of brevity. Unless otherwise specified, however, when we refer to libraries, we include archives.

²⁵⁶ Arthur B Hanson, *Omnibus Copyright Revision: Comparative Analysis of the Issues* (American Society for Information Science, Washington DC, 1973) at 42. It is interesting that three of the texts on US copyright law which we consulted in writing this chapter, written or revised in 1945, 1956 and 1962, did not discuss copying of copyright material by libraries, even in relation to the “fair use” exception, discussed later in this chapter. The texts are: Nicholson, *op. cit.*; the second edition of that work (OUP, New York, 1956); and Herbert Howell, *Howell’s Copyright Law*, edition revised by Alan Latman (BNA Inc, Washington DC, 1962).

what constituted permissible copying”.²⁵⁷ The position of libraries in relation to copying practices and photocopiers was extensively canvassed in a Senate Judiciary Committee report of 1960, entitled *Photoduplication of Copyrighted Material by Libraries*.²⁵⁸ Similarly, library copying was discussed in the following year in the Register of Copyright’s report entitled *The General Revision of the US Copyright Law*.²⁵⁹

Discussions between the Register and representatives of the various interests failed to reach an agreed position and, in the absence of such an agreement, none of the amendments to the Act proposed or enacted during the 1960s included any library provisions.²⁶⁰ In the 1965 *Supplementary Report* to the 1961 *Report*, the Register noted the vehemence of the responses to the 1961 recommendations.²⁶¹ Interestingly, the Register noted in the 1965 supplementary Report that:²⁶²

At the present time the practices, techniques, and devices for reproducing visual images and sound and for “storing” and “retrieving” information are in such a stage of rapid evolution that any specific statutory provision would be likely to prove inadequate, if not unfair or dangerous, in the not too distant future.

As was the case in the other countries discussed in this study, the issue was of increasing concern to both libraries and publishers and, starting in 1969, Bills to revise the 1909 Act began to include various versions of a provision which would cover dealings with copyright material by libraries for internal purposes as well as in relation to supplying copies to researchers.²⁶³ The push for legislative clarification was intensified by the decision in *Williams & Wilkins Co v United States*, which concerned “fair use”.²⁶⁴ Williams & Wilkins is a major publisher of medical journals, and the action related to copying of journal articles for researchers and other libraries by two federal government medical libraries. The Court of Claims, reversing the first instance decision, held that the copying of the journals was justified as “fair use”, Williams & Wilkins having failed to prove economic injury from the copying. The court also relied on the fact that the photocopying was particularly important to medical research and that the problems involved called for legislative solutions.

²⁵⁷ Hanson, op. cit., at 41–42.

²⁵⁸ US Copyright Office, *Copyright Law Revision Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary United States Senate*, Study 15, 86th Cong, 2d Sess 52 (Comm Print 1960). This study was authored by Borge Varman.

²⁵⁹ US Copyright Office, *Report of the Register of Copyrights on the General Revision of the US Copyright Law*, 87th Cong., 1st Sess. 25 (House Comm. Print 1961). The Register also issued supplementary reports in 1965 and 1975. These are reprinted in Melville B Nimmer and David Nimmer, *Nimmer on Copyright* (Lexis Publishing, New York, loose-leaf service, originally published 1963), as Appendices 15 and 16.

²⁶⁰ See Hanson, op. cit., at 42.

²⁶¹ Register of Copyrights, *Supplementary Report*, op cit., at 25–26.

²⁶² *ibid.*, at 26.

²⁶³ For example, section 108 of S 543 was introduced into the Senate on 10 December 1969: Hanson, op. cit., at 43. For a discussion of §108 in the Bill as of August 1973, see *ibid.*, at 43–45. For a summary of the legislative history of the photocopying issue, see Appendix A-2 of CONTU, *Final Report*, op. cit.

²⁶⁴ 487 F2d 1345 (Ct Cl 1973) aff’d by an equally divided Court 420 US 376 (1975).

The decision in *Williams & Wilkins Co* was controversial,²⁶⁵ and highlighted the unsatisfactory way in which the "fair use" exception operated in the library context. The editors of *Nimmer on Copyright* note:²⁶⁶

One of the most controversial, and hard fought, issues in the legislative process that produced the current Act concerns library photocopying. This issue ripened against a background of technological advances that produced the "photocopying revolution" with its attendant, almost irresistible, pressure to permit libraries, archives, and others to use such machinery without fear of copyright liability. One method to justify such copying comes under the fair use doctrine; but because endless arguments exist on both sides of the issue whether photocopying is fair, that method scarcely affords a neat solution to the current conundrum. The lobbying process, instead, focused on a potential solution apart from the realm of fair use.

Enacted as part of the 1976 revisions, and operative since 1 January 1978, section 108 sets out the specific circumstances in which libraries may deal with copyright material without having to justify the dealing as a "fair use" under section 107.²⁶⁷ Section 108 nonetheless states that a library may still deal with copyright material in ways other than those set out in the section, provided it can justify the dealing as a "fair use" under section 107.²⁶⁸

An early review of the operation of the then-new provisions was provided in July 1978 by the National Commission on New Technological Uses of Copyrighted Works (CONTU). CONTU had been created by Congress as part of the effort which led to the 1976 revision, with a particular brief to make recommendations concerning computers and photocopying. It released its final report, based on "three years of data collection, hearings, analysis and deliberation", in 1978.²⁶⁹ CONTU had earlier had an important role in formulating copying guidelines in relation to interlibrary loan copying for clients, which were included in the Conference Report on the 1976 Copyright Act.²⁷⁰

CONTU's final report, released "only a few months" after the commencement of the 1976 revision, recommended no legislative changes insofar as libraries are concerned, but did suggest certain matters that "should be studied by the Register of Copyrights in preparing the first five-year report", and also suggested certain actions that "could be

²⁶⁵ See, for example, Stephen Freid, "Fair Use and the New Act", in *The Complete Guide to the New Copyright Law* (New York Law School, New York, 1977), at 210–217, and works cited there. The case has generated a great deal of literature.

²⁶⁶ *Nimmer on Copyright*, op. cit., at §8.03[E][1][c].

²⁶⁷ *Nimmer*, op. cit., express the view elsewhere that "section 108 authorizes certain photocopying practices which may not qualify as fair use": *ibid.*, at footnote 7 in §8.03[A].

²⁶⁸ Our primary focus in this study is on section 108, and not section 107. Section 108 gives the library a defence in the circumstances addressed by the section; where it copies for a client under section 108(d) or (e), the client has still to ensure that his or her request or later dealing with the material falls within section 107 (§108(f)(2) and see *Nimmer* §13.05[E][2]).

²⁶⁹ CONTU, *Final Report*, op. cit., at 1.

²⁷⁰ See HR Rep No 1733, 94th Cong, 2d Sess 72-73 (1976), reprinted in 1976 USCCAN 5810, 5813–14.

taken voluntarily by other interested parties to facilitate access to copyrighted works in photocopy form within the framework of the Copyright Act of 1976”.²⁷¹

The 1976 revision required the Register of Copyrights to submit to Congress a report every five years on the operation of the section, including a description of any problems that may have arisen, together with any recommendations.²⁷² The first of these reports is dated 1 January 1983.²⁷³ One aspect of this Report gave rise to considerable controversy: the Register of Copyright’s view on the proper relationship between sections 107 (fair use) and 108 (library copying):²⁷⁴

§108 permits copying not authorized by §107 (the fair use provision) and ... fair use is thus not available on a broad and recurring basis once §108 copying limits have been reached. Basically, in examining copying “beyond” §108, one must determine whether the transaction is of a type which could be fair use and, if so, consider, in the fair use calculus, the copying already done under §108.

...

The structure of the law is clear; §106 grants broad and exclusive rights to copyright owners; §108 places certain limitations on those rights by permitting certain otherwise unauthorized copying to occur. Copying by libraries not permitted by §108 must generally be authorized by the copyright owner or it is an infringement of copyright.

This approach elicited a strong reaction from the American Library Association, which stated its view of the provisions in the following terms: “Rights of fair use granted under Section 107 are independent of and not limited by those rights granted under Section 108”.²⁷⁵

By the early 1990s it became apparent that copyright law would need to be amended to take into account the growth and future of digital technologies and communication systems. A working group on Intellectual Property Rights was established within the Information Policy Committee of the Information Infrastructure Task Force (IITF), which had been set up in February 1993 to report on what was referred to as “the

²⁷¹ *ibid.*, at 119–120.

²⁷² 17 USC §108(i). This requirement was included at the request of the library community: see Nancy H Marshall, “Introduction” to “Comments of the American Library Association on the Report of the Register of Copyrights to Congress: Library Reproduction of Copyrighted Works (17 USC 108, June 1983).

²⁷³ A second report was released in January 1988; we have not had access to that report. The five-yearly reporting obligation was removed as part of the Copyright Renewal Act of 1992: “After preparing two massive reports in 1983 and 1988, the Register has concluded that photocopying by researchers, scholars and other library users has not had an adverse effect on the rights of copyright holders and that reasonable guidelines for reproduction are being followed”: S Rep No 102–194, 102d Cong, 1st Sess 7 (1991), quoted in *Nimmer*, *op. cit.*, in footnote 5 to §8.03, at 8–35.

²⁷⁴ Register of Copyrights, *Library Reproduction of Copyrighted Works* (17 USC 108) at xi.

²⁷⁵ American Library Association, *Comments of the American Library Association on the Report of the Register of Copyrights to Congress: Library Reproduction of Copyrighted Works (17 USC 108)*, Washington Office, June 1983.

National Information Infrastructure” (NII). This phrase basically encompassed the Internet and digital delivery of material.

The Working Group produced a Green Paper in July 1994; its White Paper was published in September 1995.²⁷⁶ The White Paper included discussion on both fair use and section 108. In particular, in the White Paper the Working Group dismissed a suggestion that the possible split within the United States between the “information ‘haves’ and ‘have nots’ should be ameliorated by ensuring that the fair use defense is broadly generous in the NII context”.²⁷⁷ In particular, the Working Group rejected “the notion that copyright owners should be taxed – apart from all others – to facilitate the legitimate goal of ‘universal access’”.²⁷⁸ On the other hand, the Working Group also saw a continuing role for libraries in a digital environment, and recommended that the 1976 Act be amended “to expand [section 108] so that digital copying by libraries and archives is permitted under certain circumstances ... [to] ... preserve the role of libraries and archives in the digital era”.²⁷⁹

In the meantime, the Working Group had convened a Conference on Fair Use (CONFU) to bring the various interest groups together and to develop guidelines for fair uses of copyright material in the context of digitisation and online services.²⁸⁰ CONFU met regularly in public sessions between September 1994 and May 1998, and its Final Report to the Commissioner of Patents and Trademarks was submitted in November 1998.²⁸¹ The guidelines which came from CONFU deal principally with the use of copyright material in the educational context. Topics discussed at the sessions of the Conference also included the position of libraries in relation to preservation copying, interlibrary loans and document delivery. However, CONFU closed without adopting any guidelines in relation to these activities.²⁸²

For the sake of completeness, we note also that the Sonny Bono Term Extension Act contains certain exceptions in relation to library dealings with material.²⁸³

²⁷⁶ Bruce A Lehman, Chair, *Intellectual Property and the National Information Infrastructure: the Report of the Working Group on Intellectual Property Rights*, (Information Infrastructure Task Force, Washington DC, 1995).

²⁷⁷ *ibid.*, at 84.

²⁷⁸ *loc. cit.*

²⁷⁹ *ibid.*, at 226.

²⁸⁰ The Green Paper of the Working Group had noted that it would be “difficult and, perhaps, inappropriate, to apply the specific language of some of [the CONFU guidelines] in the context of digital works and on-line services”: quoted in The Conference On Fair Use, *Final Report to the Commissioner on the Conclusion of the Conference on Fair Use* (US Patent and Trademark Office, Washington DC, 1995) at 2.

²⁸¹ *ibid.*; the *Final Report* is also available at www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf.

²⁸² CONFU also discussed use of software in libraries, but an analysis of that discussion is outside the scope of this study.

²⁸³ The Sonny Bono Term Extension Act generally extended copyright protection from 50 to 70 years from the end of the year in which the creator dies. The ability of libraries to deal with material in which copyright has already expired is not the subject of this study. Further information on these exceptions, including various rules and regulations concerning the application of the exceptions, is available from the Copyright Office website within the United States Library of Congress (www.loc.gov).

7.2 Position in relation to the WIPO treaties of 1996

The United States has both signed and ratified the WIPO Copyright Treaty: the DMCA²⁸⁴ was drafted to enable the United States to be in a position to sign and ratify both that treaty and the 1996 Performances and Phonograms Treaty.²⁸⁵

7.3 Which libraries may rely on library provisions?

Libraries may only rely on section 108 in the following circumstances:

- reproductions or distributions are not made with any purpose of direct or indirect commercial advantage; and
- the collections are open to the public or at least to researchers other than researchers affiliated with the library, or the institution to which the library belongs.
- A library within a commercial organisation or business may still qualify as a library for the purposes of the section, provided it does not itself make a profit from the making or supply of copies, and the collection is open to outside researchers.²⁸⁶
- A library within an educational institution or within government could also rely on the section, including to make copies²⁸⁷ for clients, although generally educational institutions will copy under “fair use” guidelines.²⁸⁸

7.4 Dealing with copyright material on behalf of clients

Subsections 108(d) and (e) enable a librarian to deal with copyright material in specified ways on behalf of clients. This general ability is conditioned by several provisos, relating to procedure, amount and purpose.

As noted earlier, the extent to which libraries²⁸⁹ might copy copyright material on behalf of researchers had initially been the subject of a “gentleman’s agreement” in 1935 between the National Association of Book Publishers and a joint committee of the

²⁸⁴ Pub L 105-304, 112 Stat. 2860.

²⁸⁵ The short title of Title I of the Act is the “WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998”: section 101.

²⁸⁶ See, generally, *Nimmer*, op. cit., §8.03[A][1].

²⁸⁷ The wording in the section 108 refers also to the libraries’ ability to make “phonorecords”. We have not come across any information as to why there was a concern to give libraries the right to make “phonorecords” of copyright material covered by the section.

²⁸⁸ That is, under section 107: see, generally, *ibid.*, §13.05[E][3] and websites such as that of Stanford University, at fairuse.stanford.edu.

²⁸⁹ The agreement also referred to “archives, offices, museums or similar institutions”. In this Part, we generally refer only to “libraries”, for the sake of brevity. Unless otherwise specified, when we refer to libraries, we include archives.

American Council of Learned Societies and the Social Science Research Council.²⁹⁰ Under this agreement, a library could “make ... a single photographic reproduction or reduction of a part thereof” of a publication represented by the NABP, and deliver it “to a scholar representing in writing that he [sic] desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purpose of research”.²⁹¹ The agreement contained two provisos: that the person receiving the copy be given a written notice that “he is not exempt from liability ... for any infringement ... by misuse of the reproduction”; and that the library not make any profit from the service to the researcher.²⁹²

In 1961, the then Register of Copyrights recommended that, as part of the general revision of copyright law, a library be permitted to make a single photocopy, on behalf of a researcher, of:²⁹³

- one article in any issue of a periodical, or of a reasonable part of any other publication in its collection; or
- an entire publication if a copy is not available from the publisher.

Subsections 108(d) and (e) largely follow this recommendation.

The working group of CONFU which looked at both document delivery and interlibrary copying reached the conclusion that “it was not possible, at this time, to draft widely acceptable guidelines for digital delivery of print materials by libraries”,²⁹⁴ presumably on the basis that the positions of copyright user and owner interests were too far apart.

In the rest of this section, we discuss the various provisos or limitations which restrict reliance on the section.

Firstly, a commercial availability test (whether or not a copy or phonorecord may be “obtained at a fair price”) applies not only in relation to the copying of an entire work, but also in relation to copying any substantial part of a work (under the terms of the combined provisions, any part other than “a small part”). Further, it appears that availability is assessed by reference not only to new copies but also to second-hand copies in good condition.²⁹⁵ Also, copies will be assessed as being available if they are available in either hardcopy or digital form. It is also notable that unlike the Australian

²⁹⁰ Hanson, *op. cit.*, at 42.

²⁹¹ *loc. cit.*

²⁹² *loc. cit.*

²⁹³ US Copyright Office, *Report* (1961), *op. cit.*, at 26. The Register also recommended that explicit conditions apply in each case. We discuss these at 7.8 *Procedural and administrative requirements*, below. Interestingly, the Register also suggested that where “an industrial concern” wanted multiple copies of material, or where copies were being supplied commercially, the best solution would seem to be a blanket permission in return for royalties: *loc. cit.*

²⁹⁴ The Conference On Fair Use, *Final Report*, at 16–17.

²⁹⁵ See *Nimmer* at §8.03[E][2][a].

provisions, commercial availability is not qualified by whether the item may be obtained commercially “within a reasonable time”.

How commercial availability should be assessed was one of the more controversial issues in the sixteen years of discussion which preceded the passing of the 1976 Act. Interestingly, early drafts of the section referred not to whether or not a copy or phonorecord can be obtained “at a fair price” but whether a copy was available from “commonly-known trade sources in the United States, *including authorized reproduction services*” (emphasis added).²⁹⁶ This recommendation was not, however, adopted into the final drafting of the 1976 revision, although the issue of what should constitute “commercial availability” has since been raised in the digital context.²⁹⁷

Secondly, under the current provision, certain types of copyright material may not be copied under section 108 for clients.²⁹⁸ The issue of whether libraries should be able to copy *any* type of material for clients was first raised in the Senate Judiciary Subcommittee report of 1960,²⁹⁹ and the limitation of copying to certain types of works was a feature of the earliest draft proposals for section 108. A reason for this seems to have been that the primary “problem” to be addressed by section 108 was the need for researchers “to have available ... the growing mass of published material in their particular fields”.³⁰⁰ Since 1976, then, the following material has been *excluded* from the scope of section 108:³⁰¹

- musical works;
- pictorial or graphic works other than works published as illustrations, diagrams, or similar adjuncts to material that may be copied;
- sculptural works;
- motion pictures; and
- other audiovisual works other than audiovisual works dealing with news.

Thirdly, the copy provided to the client must become the property of the researcher.

²⁹⁶ CONTU, *Final Report*, op. cit., at A-40. At the time, there were various organisations offering authorised copies. For example, the National Technical Information Service was operating a service to provide some 13,000 deposit account customers with photocopies of scientific, technical and professional literature at a price which included a copying fee for the copyright proprietor; loc. cit., at 120–121.

²⁹⁷ We discuss this further in 7.7 *Dealing with copyright material for other libraries and entities*.

²⁹⁸ 17 USC §108(i); this subsection does not apply to preservation or security copying of unpublished work, to replacement copying or to making copies where the existing format has become obsolete.

²⁹⁹ Varman, op. cit., at 66; quoted in CONTU, *Final Report*, op. cit., at A-21.

³⁰⁰ US Copyright Office, *Report* (1961), at 26.

³⁰¹ As with the other types of copying not dealt with under section 108, there may be cases where a library could justify copying this type of material for a client under section 107 as a “fair use”. Note also that this list of exclusions does not apply in relation to preservation copying.

Fourthly, a warning on copyright must be prominently displayed by the library where orders for such copies are accepted from clients.³⁰²

Fifthly, the library may only supply the copy to the client where it does not have notice that the material is to be used for a purpose other than “private study, scholarship or research”.³⁰³

Sixthly, a library is restricted to making “isolated and unrelated” reproductions or distributions of the same copyright material.³⁰⁴ Specifically, the provision states that section 108 does not extend to situations where the library is aware that “it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group”.³⁰⁵ This might, for example, be the case where, to the library’s knowledge, all the students in a class request a copy of a particular item, or where a person makes serial requests for material.³⁰⁶

Further, the same subsection also proscribes any “systematic reproduction” of copies of articles or small parts of other works copied for clients or for the clients of another library.³⁰⁷ For example, this would stop a library in a commercial entity making multiple copies for employees or copying for employees where such copying would substitute for the entity ordering or subscribing to enough copies.³⁰⁸

³⁰² 17 USC §108(d) and (e).

³⁰³ Unlike the Australian provisions, the client does not have to declare that the copy is required for these purposes. Rather, the library must not have any notice to the contrary; see *Nimmer*, op. cit., at §8.03[E][2][c]. The section addresses the library’s liability; the client may still be liable for infringement if the dealing with the material by the client is not justifiable under, for example, the fair use provision in §107.

³⁰⁴ 17 USC §108(g).

³⁰⁵ 17 USC §108(g)(1).

³⁰⁶ The Register of Copyright’s 1983 report on the operation of section 108 reminded readers that: “libraries do not necessarily obtain fair use privileges from their users. That is, copying which may be fair use, if done by a user, may be ‘related or concerted’ if done by the library: the library may not do the photocopying without permission from the copyright owner”: Register of Copyrights, *Library Reproduction of Copyrighted Works* (17 USC §108) at xii.

³⁰⁷ 17 USC §108(g)(2). We discuss the background to this proviso in some detail below, at 7.7 *Dealing with copyright material for other libraries and entities*.

³⁰⁸ One House of Representatives Committee (94th Cong, 2d Sess (1976), quoted in CONTU, *Final Report*, op. cit., at 103) noted that:

a library in a profit-making organization would not be authorized to:

(a) use a single subscription or copy to supply its employees with multiple copies of material relevant to their work; or

(b) use a single subscription or copy to supply its employees, on request, with single copies of material relevant to their work, where the arrangement is “systematic” in the sense of deliberately substituting photocopying for subscription or purchase; or

Finally, it is also worth noting that a library may only copy under section 108 if it has the work in its own collection, and may only distribute a copy to a client if it can obtain that copy under the section from another library which owns the item. The provisions would therefore not entitle a library to copy, for example, from the Internet or from an online subscription service.³⁰⁹ Any copying on behalf of clients from such external sources would have to be done either under the section 107 “fair use” provision, or under licence from the copyright owner (for example, in reliance upon a statement giving permission on a website, or under the terms or conditions of the relevant subscription agreement).

7.5 Dealing with unpublished material

A House of Representatives Committee reported in 1966 that “it was impressed with the need for a specific exemption permitting reproduction of manuscript collections under certain conditions”.³¹⁰ Thus the 1976 revision introduced an exemption allowing libraries to copy unpublished manuscript material for preservation, security or deposit for research in another library. That provision still applies, and was updated by the DMCA to allow for digital copies³¹¹

7.6 Dealing with copyright material for the library’s own purposes

Subsections 108(b) and (c) allow a library to reproduce and distribute material copies and phonorecords of material in its collection for various “internal” purposes. Unlike the provisions for copying for clients, there are no restrictions in relation to the types of material that may be copied under these provisions.

Firstly, section 108(b) allows copies of any unpublished material in the collection to be made for preservation or security.³¹² Secondly, section 108(c) allows replacement copies to be made of a published work if an item has been damaged, lost or stolen, or if it is deteriorating, or if the existing format in which it is stored has become obsolete.³¹³

(c) use “interlibrary loan” arrangements for obtaining photocopies in such aggregate quantities as to substitute for subscription or purchase of material needed by employees in their work.

³⁰⁹ That is, where the subscription is merely to access a site without the right to acquire copies of the material. Of course, the subscription agreement may provide that copies may be downloaded for clients, but this would be a matter for contract law rather than a matter falling within section 108.

³¹⁰ HR Rep No 2237, 89th Cong, 2d Sess (1966), quoted in CONTU, *Final Report*, op. cit., at A-33.

³¹¹ See further 7.4 *Dealing with copyright material for internal purposes*.

³¹² Prior to the DMCA, the copies could only be “facsimile” copies. The removal of the word “facsimile”, and the move to allow three copies (discussed below) follows the 1995 recommendations of the Working Group on Intellectual Property Rights: Lehmann, op. cit., at 227.

³¹³ “A format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace”: 17 USC §108(c). The editors of *Nimmer* note the comment in the Senate Report on the DMCA (at 62) that “Under this language, if the needed machine or device can only be purchased in

When a library copies for preservation or replacement:

- the item must be a part of the collection at the relevant time;³¹⁴ and
- no more than three copies or phonorecords may be made.³¹⁵

Also, in the case of replacement copies, the library must first make a “reasonable effort” to establish that “an unused replacement cannot be obtained at a fair price”.³¹⁶

Prior to the enactment of the DMCA, only single copies could be made either for preservation or for replacement. The DMCA amended the limit on the number of copies that can be made so that three copies could be made (libraries having argued that they needed to be able to make three copies – an archival copy, a master and a use copy, from which other allowable copies may be made³¹⁷).

Also, prior to the enactment of the DMCA, each of the provisions under discussion allowed only for facsimile copying. The editors of *Nimmer* note that the provisions, “as drafted in 1976, stood as a bulwark against opening the digital floodgates”.³¹⁸ The DMCA removed that bulwark from both provisions under consideration here.³¹⁹ However, if a digital copy is made either for preservation or replacement purposes, the copy is not to be made available to the public in that format outside the premises of the library or archives which owns the digital copy.³²⁰ This reflects a longstanding view: a 1966 House Committee report had recommended that “no ... copies or phonorecords [of unpublished material] made under this section can be distributed to scholars or the public”, and such a proviso formed part of the 1976 version of section 108.³²¹ The legislative history of the DMCA is pertinent here:³²²

second-hand stores, it should not be considered ‘reasonably available’”: *Nimmer*, op. cit., footnote 63 to §8.03[E][1][b], page 8–42.

³¹⁴ This is explicit in relation to unpublished material being reproduced for preservation purposes under §108(b); it would seem to be implicit under §108(c), in that that section deals only with *replacement* copies.

³¹⁵ We understand that temporary copies made, for example, when viewing on screen are not “copies” for the purpose of the US legislation, as a copy must be both a “material object” and “fixed”: see *Nimmer* §8.02[1] and [2].

³¹⁶ 17 USC §108(c)(1).

³¹⁷ See Arnold P Litzker, “Primer on the Digital Millennium: What the Digital Millennium Act and the Copyright Term Extension Act mean for the Library Community” (www.arl.org/info/frn/copy/primer.html) at IIC and VIII.

³¹⁸ *Nimmer*, op. cit., §8.03[E][1][c].

³¹⁹ CONFU, *Final Report*, op. cit., at 7 notes that, while the issue of digital preservation of copyright material had been presented and discussed at CONFU’s initial meetings, there was a consensus that this issue was “best addressed in the context of legislative reform”.

³²⁰ Note that under §108(b) a copy of unpublished material could be supplied in digital form to another library (for example, on disk or via email). However, that library would then come under an obligation not to allow access to the copy it possessed other than on *its* premises.

³²¹ HR Rep No 2237, 89th Cong, 2d Sess (1966), quoted in CONTU, *Final Report*, op. cit., at A-33.

³²² S Rep. (DMCA), at 16; reproduced in *Nimmer*, op. cit., at footnote 63.22 (§8.03[E][1][c]), page 8–45.

In recognition of the risk that uncontrolled public access to the copies or phonorecords in digital formats could substantially harm the interests of the copyright owner by facilitating immediate, flawless and widespread reproduction and distribution of additional copies or phonorecords of the work, the amendment provides that any copy of a work that the library or archives makes in a digital format must not be otherwise distributed in that format and must not be made available in that format to the public outside the premises of the library or archives. In this way, the amendment permits the utilization of digital technologies solely for the purposes of this subsection.

The provisions may thus not be relied upon to provide, for example, dial-up access to a digital collection, or to post digital copies to websites, bulletin boards or homepages. In some ways, then, except in relation to *single* copies and phonorecords made for researchers, the US legislature still sees the library's role in the digital age as the *keeper* of material for research purposes – as a place to which the public can physically travel to consult material, a point explicitly recognised by the Senate report on the DMCA.³²³

the terms “libraries” and “archives” as used and described in this provision still refer to such institutions only in the conventional sense of entities that are established as, and conduct their operations through, physical premises in which collections of information may be used by researchers and other members of the public.

7.7 Dealing with copyright material for other libraries and entities

From its introduction in 1976, section 108 has allowed libraries to copy copyright material on behalf of other libraries for various purposes:

- for a client of the other library who needs the material for “private study, scholarship or research”; or
- to add a copy of an *unpublished* manuscript to the other library's collection for research which is to take place in that other library.

Unlike the Australian provisions, section 108 does not include provisions allowing a library to add new published material to its collection from the collection of another library, but copies of unpublished material may be acquired from other libraries for research that is to take place in the requesting library.³²⁴

Where the material is being supplied to the other library for that other library's client, the same provisos and amounts that may be reproduced apply as when a library copies for its own client.³²⁵ As also noted earlier, any supply of copies for another library's client must not constitute “systematic reproduction or distribution”. This proviso “provoked a

³²³ S Rep (DMCA) at 62; reproduced in *Nimmer*, loc. cit.

³²⁴ 17 USC §108(d)(1) and §108(e)(1). As noted above in relation to dealings on behalf of clients, the provisions which allow a library to copy for clients or to acquire a copy on behalf of a client from another library specifically state that the copy made for the client must become the property of the user. This means that a library could not rely upon these provisions to add to its collection.

³²⁵ See further 7.4 *Dealing with copyright material on behalf of clients*, above.

storm of controversy, centering around the extent to which the restrictions on “systematic” activities would prevent the continuation and development of interlibrary networks and other arrangements involving the exchange of photocopies”.³²⁶ Consequently, the subsection was amended to specifically note that nothing within the subsection “prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecord for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work”.³²⁷

As noted in the overview to this chapter, to assist in the interpretation of this proviso, CONTU, during 1977, “assisted representatives of publisher, author, librarian, and educator groups in formulating guidelines defining which interlibrary loan practices would comport with” the proviso, particularly in relation to the meaning of “aggregate quantities” and “substitute for a subscription to or purchase of” a work.³²⁸ These guidelines – generally referred to as the CONTU guidelines – set out various procedures that should be followed when requesting interlibrary copies, and set out the following quantities as “aggregate quantities” which would constitute, within any one calendar year, “systematic reproduction”:³²⁹

- six or more copies of any particular article from a journal title published within the previous five years,³³⁰
- six or more copies or phonorecords of or from any other given work (including a collective work, such as an encyclopaedia).

The guidelines also allow a copy of copyright material to be made for another library in the event that the requesting library already has a subscription or an order for a periodical, or has or has ordered another type of copyright work, but the particular item which the requesting library wants is “not reasonably available for use”.³³¹

³²⁶ HR Rep No 1476, 94th Cong, 2d Sess 77 (1976), quoted in CONTU, *Final Report*, op. cit., at A-49.

³²⁷ 17 USC §108(d).

³²⁸ CONTU, *Final Report*, op. cit., at 119 and A-50.

³²⁹ The CONTU guidelines are available at www.library.ucla.edu/copyright/contu.htm. An insight into the background against which the issue of interlibrary copying was being discussed is contained in the CONTU-commissioned study, “Costs of Owning, Borrowing, and Disposing of Periodical Publications”, by the Public Research Institute, Center for Naval Analyses. On the basis that if a journal is borrowed four or five times per year, it is more economically efficient to maintain a subscription, the report concluded that “it is unlikely, then, that libraries will be engaging in much interlibrary lending activity that falls outside the limits specified by the CONTU guidelines ... This is especially true given libraries’ current tendency to maintain subscriptions even at very low levels of usage”: CONTU, *Final Report*, op. cit., H-10. It would be interesting to evaluate whether the same situation applies today, although we understand that the level of journal subscriptions is much lower now, particularly in Australian academic libraries following the cut-backs of the 1980s and 1990s.

³³⁰ It was left for future interpretation what numbers of copies might constitute “systematic reproduction” in relation to periodicals published more than five years prior to the making of the copy.

³³¹ The proviso on this guideline is that the requesting library be able, under one of the section 108 provisions, to make the copy itself from the copy it has or has ordered.

The reasoning behind the proscription on “systematic” copying under section 108(g), and the types of interlibrary arrangements which would be outside the scope of section 108, is apparent in the comments of the then Register of Copyrights, Ms Barbara Ringer, in hearings on the revision in October 1975 before the House of Representatives:³³²

A line must be drawn between legitimate interlibrary loans using photocopies instead of bound books, and prearranged understandings that result in a particular library agreeing to become the source of an indeterminate number of photocopies.

This comment has ongoing relevance in the digital context: the proscription on “systematic reproduction or distribution” was left in place by the DMCA amendments.

With the growth of the digital communications environment, the issue of interlibrary digital supply began to be addressed. After referring to the fact that in 1976, when the CONTU guidelines were devised, “there were no readily available systems for the supply of single copies of, or for the licensing of the reproduction of multiple copies of copyrighted works”, the Working Group on Intellectual Property Rights stated as follows in its 1995 report:³³³

Now that situation has changed and the continuing evolution of the NII will permit the establishment of licensing systems to supply copies or to permit users to make reproductions of works or portions of works more widely available. Indeed, a publisher’s license to access or download all or a portion of the aggregated copyrighted works on a server might be viewed as the on-line equivalent of a subscription ... This “publication on demand” might become an effective and economic substitute for interlibrary loan on the NII. While the precise nature of all such systems cannot be known at this time, it is clear that the CONTU Guidelines, while remaining effective for print materials, cannot readily be generalized to “borrowing” electronic publications.

Further, the Working Group noted that any such “borrowing” must not lead to systematic copying, and that the existence of the types of licensing systems from copyright owners or collecting agencies referred to in the above quote “may make it difficult, if not impossible, to define ‘subscription or purchase’ as intended”.³³⁴

Consequently, “interlibrary loan” was an issue discussed by CONFU. However, the CONFU working group which was looking at whether guidelines could be agreed upon for interlibrary loans and document delivery “unanimously agreed on March 27, 1996, that it was premature to draft guidelines for digital transmission of digital documents”.³³⁵ Also, the CONFU working group failed to agree on guidelines for the digital delivery of print material under interlibrary loan arrangements,³³⁶ and while the limitation that

³³² *Copyright Law Revision; Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary on HR 2223*, 94th Cong, 1st Sess (1975) at 1801–1802, quoted in CONTU, *Final Report*, op. cit., at A-47–A-48.

³³³ Lehmann, op. cit., at 88–89.

³³⁴ *ibid.*, at 89.

³³⁵ *ibid.*, at 16.

³³⁶ *loc. cit.*

copying be only in “facsimile form” has been removed, there is still debate as to whether digital delivery of copyright material is permissible.

7.8 Procedural and administrative requirements

The Register of Copyright’s 1961 *Report* recommended that certain procedural and administrative requirements should apply if a library were to be entitled to photocopy copyright material on behalf of clients. Thus where a copy of a periodical article or a “reasonable part” of another work is copied for a researcher, the Register recommended that the applicant state “in writing that he [sic] needs and will use such material solely for his [sic] own research”; and where a copy of an entire publication was requested, the applicant would also have to state in writing that “a copy is not available from the publisher”.³³⁷ The Register also recommended that where a work which is copied for a client bears a copyright notice, “the library should be required to affix to the photocopy a warning that the material appears to be copyrighted”.³³⁸

Similarly, the CONTU guidelines for interlibrary copying set out procedural and administrative requirements. These include that the request for the supply of the copy or phonorecord be “accompanied by a representation by the requesting entity that the request was made in conformity with these guidelines”, and that the requesting entity maintain records of all requests made by it for three years.

In the relevant reports, no reasons for the adoption of such procedures and administrative requirements are specified, but it appears that the need for procedural and administrative requirements for interlibrary loans was accepted by all parties.³³⁹ One can hazard a guess that copyright owner interests supported the idea on the basis that some accountability was thus injected into the copying scheme, while library interests gave their support because a procedure such as this further minimised the risk of infringement action, and of having to defend certain dealings with copyright material as a “fair use” under section 107.

7.9 Liability for providing self-service copying equipment

Section 108 contains a subsection which provides that:³⁴⁰

nothing in [section 108] shall be construed to impose liability for copyright infringement upon a library ... for the unsupervised use of reproducing equipment located on its premises: Provided, that such equipment displays a notice that the making of a copy may be subject to the copyright law.

³³⁷ Copyright Office, *Report (1961)*, op. cit., at 26.

³³⁸ loc. cit.

³³⁹ We have not had access to the relevant Conference Report, HR Rep No 1733, 94th Cong, 2d Sess, (1976).

³⁴⁰ 17 USC §108(f)(1).

The editors of *Nimmer* note that this “statement of immunity in negative terms” is “strange”:³⁴¹

[section 108] does not itself impose any liability, but merely provides for an immunity ... from the liability imposed by Section 106. This must be understood as an immunity from the liability otherwise imposed by “this title” [that is, of the copyright law as a whole] rather than by “this section”.

The editors of *Nimmer* suggest that the negative phrasing may actually create a liability on the part of a library if it does *not* display the “notice that the making of a copy may be subject to the copyright law”.³⁴² The legislation does not specify what wording is to be used on the notice.

7.10 Technological circumvention devices and services

The anti-circumvention provisions of the DMCA prohibit circumvention of access control technologies employed by or on behalf of copyright owners to protect their works. Specifically, subsection 1201(a)(1)(A) provides that “No person shall circumvent a technological measure that effectively controls access to a work protected under this title”. This provision came into effect on 28 October 2000.

Before becoming effective, the Librarian of Congress conducted a rulemaking proceeding to determine whether there are particular classes of copyright works to be exempt from the prohibition. This determination is effective for three years. The Librarian of Congress, on the recommendation of the Register of Copyrights, ruled that only two kinds of exceptions from this provision would be allowed, one for malfunctions and one to determine which sites are blocked by filtering software.³⁴³

The library community has stated that this determination is misguided and results in an unwarranted narrowing of fair use in relation to digital media.³⁴⁴

7.11 Legal deposit

It is mandatory for publishers to deposit certain types of published material with the Library of Congress for its collections.³⁴⁵ (*Mandatory* deposit with the Library for the purposes of legal deposit is not to be confused with *voluntary* registration of copyright

³⁴¹ *Nimmer*, op. cit., §8.03[G], at 8-58.2.

³⁴² loc. cit.

³⁴³ The ruling is available at www.loc.gov/copyright/1201/anticirc.html.

³⁴⁴ See: www.loc.gov/copyright/fedreg/65fr64555.html and <http://www.ala.org/washoff/Rulemaking.PDF>.

³⁴⁵ 17 USC §407. The Copyright Office has issued regulations exempting certain categories of material entirely from the deposit obligation; material may be exempted on the basis that it is not suitable for including in the Library of Congress collections or for use in national library programmes. In other cases, publishers may apply for an exemption from the obligation. For a good overview of mandatory deposit, see www.loc.gov/copyright/circs/circo7d.html.

with the Copyright Office, although deposit of works with the copyright office for voluntary registration satisfies the mandatory requirements.)

Copies of works deposited either with the Library of Congress under the mandatory deposit obligations or with the Copyright Office “are available to the Library of Congress for its collections, or for exchange or transfer to any other library”.³⁴⁶ If deposited material becomes part of a library collection, including a part of the Library of Congress collection, it may be dealt with by the library within the scope of section 108.

³⁴⁶ 17 USC §704 (b); see also §407(b).

Part 8: Conclusion

While copyright is an international form of protection, the way it applies – subject to compliance with the various international treaties – is largely determined by domestic law and domestic considerations. It is therefore perhaps not surprising, and merely a reflection of human time and frailty, that copyright practitioners and those working in organisations which regularly deal with copyright issues, such as libraries, tend to take their own copyright law and practice as both proper and eternal. A comparative study is useful therefore in widening the points of reference in which one otherwise operates.

From this study, we would particularly draw attention to the following points.

Firstly, in all four jurisdictions we studied, library provisions are relatively recent additions to the copyright landscape. Indeed, in Canada, provisions relating specifically to libraries have been operating only since 1 September 1999.

Secondly, analysing a number of the reports and reviews relating to library provisions or reprography generally, library provisions and the way they operate can largely be characterised as contingent on very particular circumstances: the effects of bombing and the uncertainty of paper supplies for book publishing in postwar Britain;³⁴⁷ the slowness of surface mail in delivering journals to Australia;³⁴⁸ the inability to contact publishers or copyright owners expeditiously;³⁴⁹ or the impracticality of setting up a licensing system.³⁵⁰

Thirdly, recommendations that libraries should be entitled to deal with copyright material in certain ways without permission have often been accompanied by statements that the continuation of the exception should periodically be reviewed.³⁵¹

Fourthly, apart from in Australia, there has been great caution in enacting special provisions for libraries in relation to digital copying or communication of copyright material before the market for digital works is given a chance to develop, and before a need for such provisions is demonstrated. Similarly, other countries have been cautious not to rush into legislating special provisions for libraries to access material which is technologically protected. For example, Congress in the United States has been unwilling to permit broad rights for electronic or digital copying by libraries, and the US Copyright Office has been wary of recommending that libraries be given a role which publishers

³⁴⁷ Gregory Committee, *op. cit.*, para 43.

³⁴⁸ Franki Committee, *op. cit.*, para 36.

³⁴⁹ Keyes and Brunet, *op. cit.*, at 145; see also Franki Committee, *op. cit.*, para 4.20.

³⁵⁰ Franki Committee, *op. cit.*, paras 2.39 and 2.48.

³⁵¹ See, for example, the comment by the Spicer Committee, *op. cit.*, para 142 that conditions on the copying of non-periodical works by libraries should be inserted in the Regulations “so that the situation can be easily rectified if it leads to abuse”. See also the Franki Committee, *op. cit.*, para 4.08, that “no special legislative provision at present is required to restrict the supply of copies of articles on a systematic basis through the interlibrary loan scheme, but the situation should be kept under review”.

might be able to fill, or that special exceptions be given to libraries in relation to circumvention of technological protection.

Fifthly, while each country we studied has developed various provisions which may be relied upon without payment to copyright owners, it is interesting to note that some types of dealings by libraries with copyright material which are free in Australia, are in other countries only free if a licence cannot be obtained; or they involve *payment* to the copyright owner; or they may not occur *at all* without the copyright owner's consent. At several key points when reprographic technologies, such as photocopying, were emerging and becoming widely available, Australia took a different and more library-friendly approach than was being taken in the other countries studied. Relatedly, it is noticeable that other countries are more attuned to the development of licensing cultures to elaborate on how libraries may deal with copyright material.³⁵²

Sixthly, other countries have often had a more laissez-faire attitude to balancing the interests of copyright owners and users, encouraging the development of codes and mutually agreed practices rather than looking to detailed provisions in statutes and regulations to draw the lines between what libraries may or may not do.

It is surprising to note that the library provisions in Australia, shaped as elsewhere in response to reprographic technology, were already more generous to libraries than were library provisions in Canada, the United Kingdom or the United States. This generosity existed in relation to what may be copied; how much may be copied; and in the fact that none of the library provisions require payment to copyright owners.³⁵³

In light of all the above, it is interesting that Australia, in its Digital Agenda amendments, has essentially *extended* the provisions which have applied to photocopying, and generally allowed digital reproduction and communication where copying only was previously allowed.³⁵⁴ As indicated in Part 4 (concerning library provisions in Australia), the Australian government did, after intensive lobbying, introduce a tighter "commercial availability" test for interlibrary copying from electronic material than applies when dealing with hardcopy material. However, it is interesting to note that the Digital Agenda amendments in Australia also ensure that, for the purposes allowed within most of the library provisions, libraries have the ability to access

³⁵² As the European Draft Directive preamble states, "specific contracts or licences should be promoted which, without creating imbalances, favour [libraries and equivalent institutions, as well as archives] and the disseminative purposes they serve": Directive, Preamble, para (40); see the similar recommendations by the Whitford Committee, *op. cit.*, para 291, concerning promotion of licensing schemes and that the latitude in relation to library copying should no longer apply "once a scheme is in operation". By way of contrast, in Australia the Franki Committee, *op. cit.*, para 2.30, made the comment, extraordinary in hindsight, that "we do not think that any significant number of [authors] on a world wide basis would join a copyright [collecting] agency".

³⁵³ Note, however, that we understand some Australian public libraries are now availing themselves of the document delivery licence offered by Copyright Agency Limited.

³⁵⁴ This is clear in, for example, the second reading speech of the Attorney-General, Hon Daryl Williams, in relation to the Copyright Amendment (Digital Agenda) Bill, *Hansard* Thursday 2 September 1999 at 9749-9750:

The new legislation ... extends the existing exceptions for libraries and archives to the reproduction and communication of copyright material in electronic form.

copyright material despite any technological protection measures which copyright owners might use to try to control access.

This study shows, then, that Australia is out of step with international developments in library provisions in light of the digital environment. Perhaps by the time the Australian legislation is reviewed in or before 2003 or 2004, other countries will have come to take the approach it has adopted. However, given the approaches in other countries to photocopying, and given the indications in relation to the digital environment so far, this is by no means certain. Contrary, therefore, to the assertion by the relevant Minister that the Digital Agenda amendments “clearly place Australia among the international leaders in this area”,³⁵⁵ this study shows that Australia has not only already “gone it alone” in relation to many aspects of the photocopying exceptions, but that the Digital Agenda amendments have further underlined our singularity.

³⁵⁵ The Attorney-General, Hon Daryl Williams, second reading speech, Copyright Amendment (Digital Agenda) Bill 1999, *Hansard* Thursday 2 September 1999 at 9748.

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