

Licence Agreements and Copyright for Parliamentary Libraries

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This paper is presented for information only. The advice provided to the Parliament of Western Australia should not be relied upon by other persons. Persons should obtain their own independent legal advice in relation to the matters discussed in this paper and should not act in reliance upon the matters contain herein.

This paper arises out of a request for some legal advice by Judy Ballantyne, Library and Information Services Manager, made in January this year.

Background

The parliamentary library had for many years been copying newspaper articles by scanning them and then placing them on an internal database available to members of parliament. This was quite cumbersome and labour intensive. With the advent of electronic versions of the only local daily newspaper, *The West Australian*, there was an opportunity to streamline this process by subscribing to the new format.

Unfortunately the application for the electronic version of the newspaper came with a "one size fits all" licence agreement. The agreement was in the usual form warning that the publication was copyright and that the re-publication of the material was not permitted. There was a specific clause prohibiting republication by mirroring the data on an internal server. Use was permitted of the data only for the purposes permitted by applicable State or Federal law.

Librarians were concerned that by "cutting" the articles from the electronic version of the newspaper and then re-publishing it on the database available on the parliamentary intranet (POWAnet) server they were in breach of the "no copies clause" in the agreement. The concern was that this re-publication would expose the Parliament to the possibility of being sued for breach of the licensing agreement and also expose librarians to possible action for breach of copyright.

Advice

My advice to Judy was as follows:

"A licence agreement cannot override the general law. If there is a conflict between the terms of the licence and the law, the law prevails.

This would be the same if a State law conflicted with the Commonwealth law as copyright is an exclusive commonwealth jurisdiction under s.51(xviii) of the Constitution. In those circumstances the State law would be invalid under section 109 of the Constitution.

The relevant section of the *Copyright Act 1968* (Cth) to which you refer provides:

‘Copying by Parliamentary libraries for members of Parliament

48A The copyright in a work is not infringed by anything done, for the sole purpose of assisting a person who is a member of a Parliament in the performance of the person's duties as such a member, by an authorized officer of a library, being a library the principal purpose of which is to provide library services for members of that Parliament.’

Conclusion

It seems to me that the current situation of Parliament subscribing to *The West* and then library staff taking copies of relevant articles in the hardcopy newspaper pursuant to the exemption granted in the *Copyright Act 1968* (Cth) would be no different if you received the document in electronic format and then published to members relevant articles from the electronic version.

Copyright would not be infringed by continuing your current practice with the electronic version of *The West*.

Call me if you want to discuss the matter further.”

Judy was of course happy that we had not breached copyright but what about the licence agreement? Could the Parliament still be sued? I responded:

In my view the issue of copyright also clears up the issue of the licence agreement. The Parliament would simply claim protection under the Copyright Act (and also Parliamentary Privilege).

The object of the no copies clause in the licence agreement is to prevent breach of copyright and consequential loss of income to *The West* by licensees who go off and re-publish the document to every Tom, Dick and Harry. This is what section 48A of the Copyright Act 1968 permits the Parliamentary Library to do in relation to a distinct class..... members of parliament.

The licence agreement cannot prevent the Parliament from doing what it is authorised to do under the Copyright Act. The clear policy of the section is that access and dissemination of news media to members is necessary for parliamentarians to undertake their duties, hence the authority provided by s.48A.

If you felt it necessary, you could amend the licence agreement's no copy clause (if this is possible) to state "Subject to the privileges, exemptions or authority granted to Parliament provided by law, the licensee agrees not to copy, reproduce...blah blah blah."

I just don't think the above is necessary but it may appease *The West* and make it clear from the start that we are copying the electronic version of the paper for members.

Any action by *The West* against the Parliament for breach of the agreement for copying to members would be thrown out of court because we have the legal authority to copy despite the agreement. In addition a withdrawal of serviced or legal action against Parliament on these grounds may be a contempt of Parliament.”

The database is available on the POWAnet. Members require a password to access the intranet site but it is common that the logon is provided to

members' researchers and electorate officers so that they may also access the POWAnet, which include library databases.

A cautious approach

Having later reviewed the advice given, I have come to the view that a more cautious approach should be taken and the licence provider consulted on the intended use of the licensed material prior to the execution of any licence agreement. Preferably the standard licence agreement should be altered in the manner similar to that suggested in my e-mail. Alternatively, an acknowledgement in writing should be provided by the licence provider indicating that the provider is aware of the use to which the product will be put by the parliamentary library (should the intended use conflict with the standard licence agreement terms and conditions). This use should be consistent with the authority provided under the *Copyright Act 1968* (Cth).

The acknowledgement could then raise an estoppel in the event that the licence provider later sought to rely upon the standard terms in an action for breach of contract/licence agreement.

Points of note on applicable law

Sections 48A, 50 & 104A Copyright Act 1968 (Cth)

- Source - Cth Constitution s.51(xviii)
- Copyright is an exclusive jurisdiction of the Cth.
- States cannot legislate in relation to copyright so as to conflict with *Copyright Act 1968* (Cth).
- If they do then State law will be invalid to extent of inconsistency under Cth Constitution s.109.
- Sections 48A and 104A introduced in 1984 by Amendment Bill.
- Applies not just to Cth parliamentary library but all parliamentary libraries.
- Rationale - uncertainty in relation to activities carried out by Parliamentary Libraries throughout Australia vis a vis copying copyright material for MPs.
- Effect - "works" cover literary, dramatic, musical and artistic works (s 10(1)).
- Section 104A, similar to s 48A, deals with uses made by parliamentary libraries of 'subject matter other than works' such as sound recordings, cinematograph films, television and radio broadcasts
- Protection afforded by ss 48A and 104A is extremely broad. Not limited merely to reproduction and communication of the materials to which the sections relate, but apply to 'anything done' in relation to those materials.
- Section 50 provides protection against liability for infringement of copyright in cases where other libraries (except those run for profit) supply to parliamentary libraries copies of published copyright works held by them, and the copies are supplied for the purpose of assisting MPs in the performance of their duties as members.

- Also other express defences and defence of “Fair Dealing” with copyright material such as for study and research (ss.40, 103A); criticism or review (ss.41, 103A); reporting of news (ss.42, 103B); professional advice by legal practitioners and patent and trade marks attorneys (s.43(2)).

Section 48A & 104A limitations

- Provisions operate only when the purpose of the conduct is to assist MPs in the performance of their duties as members. This will include not only when an MP (or his or her agent) asks a parliamentary library to supply a copy of copyright material, but also when a parliamentary library initiates reproduction of copyright material for distribution to MPs or to augment the library's collection;
- Exemptions from infringement afforded by ss 48A and 104A of the Act are limited to cases in which the acts of the relevant parliamentary library are to assist MPs whom the library serves. Hence, these exemptions would not apply if, say, a member of Parliament of Victoria were to seek to obtain a copy of copyright material held in the Commonwealth's parliamentary library or in the parliamentary library of another State (but note s.50 defence if supplied through their own library);
- The duties of MPs include not only participation in parliamentary proceedings but also the giving of advice to constituents and making representations on their behalf, for example, representations to a Minister.

No Compensation to Copyright Owners

Interesting that ss.48A and 104A do not mirror other sections such as s.183 of the Act (services of the Crown) regarding rights of copyright owners to be compensated for acts which, but for statutory exceptions, would constitute infringements of copyright.

Provisions do not oblige the libraries to pay any remuneration to copyright owners. Nor do they include qualifications of the kind found in those other provisions in the Act which relate to fair dealing with copyright material. Section 48A of the Act, for example, would make it possible for a parliamentary library to copy the whole or a substantial part of a recently published book, copies of which are readily obtainable elsewhere at an ordinary commercial price.

The Act does not impose any obligation on officers of parliamentary libraries to accede to requests made by MPs for reproduction and supply of copies of copyright material.

Parliamentary Privilege

Another protection afforded to MPs and by extension Parliamentary Staff is under Parliamentary Privilege.

Article 9 of the English *Bill of Rights 1689* is the most important in this context. Article 9 provides that:

The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. (Emphasis added)

This provision applies in all Australian polities either by statute or as a matter of common law.

The effect of Article 9 is that MPs and other participants in parliamentary proceedings (such as witnesses appearing before a House or a parliamentary committee) do not incur any legal liability for what they say or do in the course of parliamentary proceedings. This principle is recognised to be so fundamental that the immunities it confers cannot be extinguished or eroded except by clear statutory enactment.

This would cover library staff copying copyright material for a member for use in his parliamentary duties in the House. It would also appear that section 48A was enacted to “cover the field” and remove doubt that it did not extend to materials copied for use by electoral officers or outside of parliament.

Uncertainty of application of Article 9 arises mainly in relation to the question of what are to be regarded as “proceedings in a parliament”. There is little doubt that Article 9 affords absolute protection against liability in the following situations:

- Reproduction of copyright material by an MP in the course of parliamentary debate;
- Reproduction of copyright material in evidence given to a House or a parliamentary committee or a submission made to such a body;
- Reproduction of copyright material in a report presented by a parliamentary committee to a House or to Houses of a parliament, or in some other document which is tabled in a House;
- Reproduction of copyright material for circulation among members of a parliamentary committee to assist them in the discharge of their functions.

The protection of Article 9 of the *Bill of Rights 1689* may not extend to the uses which have been made of copyright material in the following circumstances:

- Republication outside parliamentary proceedings of copyright material which has been reproduced in the course of such proceedings, whether in the speech of an MP, in evidence given by a parliamentary witness, or in a document tabled before a House;
- Circulation by MPs of reproductions of copyright material among electors, or some of them, or even among other MPs (even those who are Ministers), unless the reproductions and their circulation are clearly describable as acts done in the course of parliamentary proceedings. An MP may have no defence to an action for infringement of copyright if, for example, he or she has arranged for multiple copies of a copyright work to be circulated simply for the purpose of alerting the recipients of the copies to a need for law reform, or for investigation of some matter.

Parliamentary Papers Act 1891 (WA)

- *Stockdale v Hansard* (1840)
- Sections 1 and 3 *Parliamentary Papers Act 1891* (WA).
- Reason for an order that a paper do lie upon the table and be printed.
- Papers accorded protection under parliamentary papers legislation may include copyright material, the reproduction of which would ordinarily constitute an infringement of someone's copyright.
- Reserves Report had a cartoon from the Sunday Times reproduced on the back page. Would be a clear breach of copyright without protections afforded by *Parliamentary Papers Act 1891* (WA).

Acknowledgement

Given this is a paper on copyright it would be remiss of me not to acknowledge my sources of information.

1. "Immunities of Agents of Government from Liability for Infringement of Copyright" by Enid Campbell and Ann Monotti - [2002] FedLRev 16.
2. "Copyright, Privilege and Members of Parliament" by Gareth Griffiths - Briefing Paper No13.2000, NSW Parliamentary Library Research Service.